(18,344.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 491.

THE CITY OF NEW YORK AND BIRD S. COLER, AS COMPTROLLER THEREOF, PETITIONERS,

vs.

SAMUEL PINE AND FREDERICK MÜLLER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable, the Judges of the Circuit Court of the United States of America, for the Southern District of New York. 1

Your orators, Samuel Pine and Frederick Muller, bring this, their bill of complaint, against the Mayor, Aldermen and Commonalty of the City of New York, and thereupon your orators aver:

First—Your orators are citizens of and residents in the State of Connecticut and owners in fee of land in said State, situated on the Byram river, or on the West Branch thereof, and the defendant, the Mayor, Aldermen and Commonalty of the City of New York, is a 2 municipal corporation organized and existing under the laws of the State of New York.

Second—The West Branch of the Byram river has its source in Westchester County, in the State of New York, and flows in a generally southerly course through Westchester County, in New York State, for about five miles, and then flows into and through the State of Connecticut, forming with the Middle and East Branches thereof, the Byram river, which said Byram river, with the exception of a part of the Westerly Branch, as above stated, flows continuously 3 and only through the State of Connecticut until it reaches tide water.

Third—The said river and its said branches are non-navigable until said river reaches tide water. Said river then becomes navigable, and then becomes the boundary between the States of Connecticut and New York.

Fourth—Your orators further aver that the defendant began about two years ago the building of a dam across the said West Branch of said Byram river

about five hundred feet north of the Connecticut line, and is now building said dam and it is now near completion, and your orators are informed and believe that the said defendant intends to divert or cause to be diverted the water of said West Branch or some of it from the natural channel thereof, and intends to divert or cause the same to be diverted from flowing through its natural channel into and through the State of Connecticut, and by, through and over land owned by your orators. That the Westerly Branch of said Byram river is the branch from which the largest supply of water for said river is received, and that the diversion of the water of said branch or any of it would cause great injury and damage to your orators and each of them.

Fifth—Your orators further aver that they as riparian owners of land in the State of Connecticut, on said Byram river or on the West Branch thereof, are each of them accustomed to use the water of said river or of the West Branch thereof, and that the said river or its West Branch flows through or by land belonging to your orators in the State of Connecticut, and that valuable mill sites and other valuable rights and privileges are owned by your orators on said Byram river or on the West Branch thereof; and that your orators live upon land fronting upon said river, and that the homes of your orators are in close proximity thereto, and that the health of your orators would be directly affected by lessening the flow of the water in said river, and that the flow of said river would be materially lessened by the diversion of the water of the said West Branch, or any part thereof, and that they, your orators, and each of them, would be damaged in the sum of twenty-four hundred dollars ($2,400) and more.

Sixth—Your orators further aver that as they are advised and believe, the defendant herein ought not to continue the building of said dam, and ought not to maintain or continue the same, and ought not to divert

the water of said river or of said West Branch thereof.

7

Seventh—Your orators further show that they are advised and believe that the defendant may not lawfully divert the water of said West Branch of the Byram river, or any thereof.

Wherefore, your orators bring this bill of complaint in equity and seek the intervention of this Court, as is necessary for your orators to do in order that they may be protected in their rights in the premises, and your orators pray your Honors to enjoin and restrain the defendant, its officers, agents, attorneys and employees and all other persons from continuing to build said dam or any part thereof across the said West Branch of the said Byram river, and from maintaining or continuing to maintain the same and from diverting the water of said West Branch or any part thereof, or to prevent in any way the water of said West Branch or any part thereof from flowing through its natural channel at any time, and to grant your orators such other and further relief as to your Honors may in the premises seem meet.

8

May it please your Honors to grant unto your orators a writ of subpœna to be directed to the said Mayor, Aldermen and Commonalty of the City of New York, thereby commanding it at a certain time and under a certain penalty therein to be limited, to personally appear before your Honors in this Honorable Court and then and there, full, true, direct and perfect answer make to all and singular the premises and further to stand to, perform and abide by such further order, direction and decree therein as to your Honors shall seem meet.

9

Your orators will ever pray, etc.

SAMUEL PINE,
FREDERICK MULLER.

MORAN & WILLIAMS,
Complainants' Solicitors.

STEPHEN G. WILLIAMS,
Of Counsel.

10 SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of Westchester. }

Samuel Pine and Frederick Muller, being severally duly sworn, each for himself says: That he is one of the complainants in the foregoing bill of complaint; that he has read the said bill and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief and as to such matters he believes it to be true.

SAMUEL PINE.
FREDERICK MULLER.

Sworn to before me this 24th }
11 day of March, 1896. }

JOHN LEONARD,
Notary Public,
in and for Westchester Co., N. Y.

12

CIRCUIT COURT OF THE UNITED STATES 13

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendant.

In Equity. 14

The answer of the above-named defendant to the bill of complaint of the above-named complainants.

In answer to the said bill of complaint the Mayor, Aldermen and Commonalty of the City of New York says as follows:

First—It is a municipal corporation organized and existing under the laws of the State of New York, but it has no knowledge or information sufficient to form a belief whether the complainants are citizens of and residents of the State of Connecticut or owners in fee of land in said State on the Byram river or on the West Branch thereof. 15

Second—It admits the allegations in the paragraphs of the bill of complaint marked second and third.

Third—Many years ago it took proceedings to acquire title to large quantities of lands in the County of Westchester to be used in connection with the supply of water to the City of New York, and it pro-

16 ceeded to construct, and is still constructing, numerous dams, aqueducts, reservoirs and other structures necessary for the said supply of water, and has expended upward of thirty millions of dollars in providing for said water supply for the residents of the City of New York. It admits that, among other things, it is building a dam across the West Branch of the Byram river, in the State of New York, and a short distance from the boundary line between that State and the State of Connecticut, but it avers that the said dam is not completed, nor near completion, and will not prevent the natural flow of the said West Branch of the Byram river for at least one year. It admits that it intends to divert some or all of the water of said West
17 Branch from its natural channel, but whether the flow of the said river in its natural channel is by, through or over lands owned by the complainants in the State of Connecticut it has no knowledge or information sufficient to form a belief, and it alleges that the diversion of water of the said branch would cause but little, if any, injury and damage to the complainants or either of them.

Fourth—It has no knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraph of the complaint marked fifth, and it alleges that the mill sites, referred to in the bill of complaint, even if owned by the complain-
18 ants, are of little if any value, and that the lessening of the flow of water by diverting the whole or a part of the West Branch of said river, would be of little or no injury to persons living along the shore of the said Byram river. It denies, on information and belief, that the premises mentioned in the complaint would be damaged in the sum of $2,400 and more in each case.

Fifth—It states, as to the sixth and seventh paragraphs of the bill of complaint herein, that the building of the said dam is, or will be of great and

permanent public benefit to the City of New York and its residents, and to all of the persons dwelling therein, and it avers that it is and always has been amply able and willing to pay any damages that the complainants may suffer from being deprived of the water that naturally comes from the said West Branch of the Byram river.

Wherefore, it prays that the bill of complaint herein be dismissed, with costs.

FRANCIS M. SCOTT,
Counsel to the Corporation.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

City and County of New York, *ss.*:

Richard A. Storrs, the Deputy Comptroller of the City of New York, and an officer of the defendants in the above-entitled action, being sworn, says: That the foregoing answer is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says, that the reason why the verification is not made by the defend-

22 ants is that they are a corporation; that this deponent is an officer of the same, to wit, Deputy Comptroller, and that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows, to wit: Information obtained from the books and records of the Department of Finance, or of other departments of the City government, or from statements made to him by certain officers or agents of the defendant.

RICH. A. STORRS,
Deputy Comptroller.

Sworn to before me this 24th day of April, 1896.

G. L. STERLING,
23 [SEAL.] Notary Public,
New York County.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER

against

24 THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

Replication of Samuel Pine and Frederick Muller, the complainants, to the answer of the Mayor, Aldermen and Commonalty of the City of New York, defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold

insufficiencies of the said answer, for replication there- 25
unto saith, that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matter and things this repliant is and will be ready to aver and prove, as this Honorable Court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

MORAN & WILLIAMS,
Solicitors for Complainants. 26

27

28 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

29 PROOFS FOR FINAL HEARING, taken on the part of the plaintiffs before James A. Renwick, one of the standing Examiners of the U. S. Circuit Court for the Southern District of New York, in the Second Circuit, pursuant to the 67th Rule of the Supreme Court of the United States, in Equity, as amended.

NEW YORK, October 4, 1897, 2 o'clock P. M.

Parties met pursuant to notice, dated the 20th day of July, 1897, and admission of service of same of even date.

30 Appearances—STEPHEN G. WILLIAMS, Esq., for plaintiffs.

By agreement with Mr. H. T. Dykman, counsel for the respondent, the examination of the plaintiffs by Mr. Williams will be taken subject to all objections and exceptions to be made hereafter by Mr. Dykman, and the right to cross-examine on behalf of the respondent is reserved.

SAMUEL PINE, a witness produced on the part of the plaintiffs, having been by me first duly sworn in the above-entitled action to testify to the truth, the whole truth and nothing but the truth, in answer to inquiries propounded by plaintiffs' counsel, deposes and says as follows : 31

1 *Q.* What is your name? *A.* Samuel Pine.

2 *Q.* Are you one of the complainants in the action brought by one Samuel Pine and Frederick Muller against the City of New York? *A.* I am the person.

3 *Q.* Are you a citizen of the United States? *A.* I am.

4 *Q.* And of the State of Connecticut? *A.* Of the State of Connecticut.

32

5 *Q.* How long have you been a citizen of the State of Connecticut? *A.* Since 1872, as near as I can remember.

6 *Q.* Are you the owner of real property in the State of Connecticut? *A.* I am.

7 *Q.* What is this paper I hand you? *A.* A deed from my father.

8 *Q.* To you? *A.* To me.

Plaintiffs' counsel offers in evidence deed from James Pine to Samuel Pine, and the same is marked "Plffs.' Exhibit, Pine Deed, Oct. 4, 1897, J. A. R., Examiner."

9 *Q.* Where is the land described in this deed situated? *A.* Town of Greenwich, on the Byram river. 33

10 *Q.* Does the Byram river run through your land or does it bound it on one side? *A.* It bounds it on the east side.

11 *Q.* About how many feet have you along that river? *A.* By the City survey, about 3,725 feet.

12 *Q.* What is your boundary on the east side? *A.* The middle of the Byram river.

13 *Q.* For how many years have you been the owner in fee of this property free from any life estate? *A.* From the time of my father's death.

34 14 *Q.* About when was that? *A.* I came in full possession of it at the time of my father's death.

15 *Q.* When was your father's death? *A.* I think about 1890.

16 *Q.* What value do you place upon your property there? *A.* $50,000.

17 *Q.* Now, can you give some reasons for placing that value upon it? *A.* Manufacturing feldspar.

18 *Q.* Is there a deposit of that on your property? *A.* We believe to be, yes; we are working it.

19 *Q.* You know there is a deposit of feldspar there? *A.* Yes; a very heavy deposit of feldspar.

20 *Q.* Do you make any use of the water of the Byram river? *A.* Yes; all general farm use, house
35 use and mill use for steam.

FREDERICK MULLER, a witness produced on the part of the plaintiffs, having been by me first duly sworn in the above-entitled action to testify to the truth, the whole truth and nothing but the truth, in answer to inquiries propounded by plaintiffs' counsel, deposes and says as follows:

1 *Q.* What is your name? *A.* Frederick Muller.

2 *Q.* Are you one of the complainants in this action of Pine and Muller against the City of New York? *A.* Yes, sir.

3 *Q.* Are you a citizen of the United States? *A.* Yes, sir.

36 4 *Q.* And are you also a citizen of the State of Connecticut? *A.* Yes, sir.

5 *Q.* How long have you been a citizen of the State of Connecticut? *A.* Since 1891.

6 *Q.* Are you the owner of real estate in the State of Connecticut? *A.* Yes, sir.

7 *Q.* What is this paper (handing witness paper)? *A.* That is my deed, sir.

8 *Q.* To property in the State of Connecticut? *A.* Yes, sir.

Plaintiffs' counsel offers in evidence deed from Andrew Burns and another to Frederick Muller, and the

same is marked "Plffs.' Exhibit, Muller Deed, Oct. 4, 1897, J. A. R., Examiner." 37

9 *Q.* Where is this property situated? *A.* In Connecticut.

10 *Q.* Whereabouts in Connecticut? *A.* On the Byram river, in the Town of Greenwich.

11 *Q.* Through what part of your property does the Byram river flow? *A.* Runs right through my place.

12 *Q.* So you own land on both sides of it? *A.* Yes, sir.

13 *Q.* And about how many feet frontage have you on the river, counting both sides, altogether? *A.* 2,290 feet.

14 *Q.* Have you improved your place in any way since you bought it? *A.* Yes, sir. 38

15 *Q.* In what way? *A.* Well, I have improved my buildings; some of them were going to pieces a little bit, and I improved them, and I improved the land; the land was wild.

16 *Q.* What do you consider your property now worth? *A.* Well, I ain't got no idea because I don't care about selling it.

17 *Q.* Without regard to your idea to sell it, what do you think is about the value? *A.* About $8,000.

18 *Q.* Do you make any use of the water of the Byram river? *A.* Yes.

19 *Q.* What uses do you make of it? *A.* Well, my cattle goes there regularly every day and waters; helps my wells along. 39

20 *Q.* General farm use? *A.* General farm use.

Further hearing adjourned to Tuesday, October 19, 1897, at 2 P. M.

Pages 7 to 13, inclusive, being deposition of George W. Birdsall, signed and filed in United States Circuit Court of Appeals on motion.

NEW YORK, November 8, 1897. 1a

PINE
against
THE MAYOR.

Met pursuant to adjournment.

Present—The EXAMINER; Mr. STEPHEN G. WILLIAMS, for plaintiffs; Mr. HENRY T. DYKMAN, for defendants. 2a

GEORGE W. BIRDSALL, a witness produced on the part of the plaintiffs, having been first duly sworn by said Examiner to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination:

By Mr. WILLIAMS:

Q. What is your name, age and occupation? *A.* George W. Birdsall; civil and mechanical engineer; age, sixty-one years. 3a

Q. In what way do you practice your profession as mechanical and civil engineer? *A.* At present I am Chief Engineer of the Croton Aqueduct for the City of New York, in charge of one of the bureaus of the Departments of Public Works, having charge and control of the water supply of the City of New York.

Q. How many years have you held this position? *A.* As Chief Engineer since 1884; as Assistant Engineer since January 1, 1872.

4a Q. Are you from your position acquainted thoroughly with the various sources of the water supply of the City of New York? A. I am; the present City of New York, because we are now commencing to spread ourselves a little.

Q. Are you acquainted with the proposed supply to be derived from a branch of the Byram river?

Objected to.

Mr. DYKMAN—There is no such thing as a proposed supply from the Byram river. The supply is here, or is fixed by resolution of the proper authorities.

Question withdrawn.

5a Plaintiffs' counsel offers in evidence chapter 445 of the Laws of 1887 of the State of New York as amended to date.

Q. Are you acquainted with the Byram river, Mr. Birdsall? A. I am.

Q. Will you give me a description of it as to where it rises and its branches?

Mr. DYKMAN—What part of the Byram river; in which State?

Mr. WILLIAMS—That is what I want Mr. Birdsall to say.

6a A. It rises in Westchester County, the State of New York, one branch in the Byram Pond and its tributaries, the other at Wampus Pond and its tributaries; these two branches come together near the Connecticut State line, in the State of New York; the other branch of the Byram river rises in the State of Connecticut, and with its several branches joins the other branch of the river about one mile north of Glenville, State of Connecticut; these two form the Byram river, which then flows south and west through the State of Connecticut until it reaches about one mile north of Portchester, from which place it flows to the Sound

and forms the dividing line between the State of New York and State of Connecticut. 7a

Q. Can you tell me what is the area of the watershed of that part of Byram river which lies in Westchester County, New York State? *A.* Yes.

Q. What is it? *A.* North of the junction of the Wampus and Byram Ponds the area is seven and sixty-six one hundredths ($7_{\frac{66}{100}}$) square miles; between that and one of the division lines between Connecticut and New York, which is about three-quarters of a mile south of that, there is a further area of about one square mile, making to one of the boundary lines of the State of Connecticut, eight and sixty-six one hundredths ($8_{\frac{66}{100}}$) square miles; between a point just north of Portchester and the Sound, the area of the watershed of the Byram river—— 8a

Mr. DYKMAN—Only in the State of New York.

Mr. WILLIAMS—Perhaps I better say Westchester County.

The WITNESS—That is in Westchester County also. Portchester is in Westchester County.

A. There is an area of three-quarters of a square mile.

Q. What is the area of the watershed of the other branches of the Byram river which you stated flowed into the Byram river about a mile above Glenville? 9a

Mr. DYKMAN—Objected to, because it is not limited to Westchester County and on the further grounds that it is incompetent, improper and immaterial.

Q. Mr. Birdsall, at what distance from the Connecticut State line has the City of New York erected a dam across the Byram river in Westchester County? *A.* About 700 feet.

Q. Does the eight and sixty-six one-hundredths miles of watershed north of the Connecticut line include the area south of that dam? *A.* It does.

10a Q. What is the area of the watershed north of that dam in Westchester County? A. Seven and sixty-six one-hundredths square miles.

Q. What is the average rainfall on the area of the watershed north of this dam?

Mr. DYKMAN—Objected to unless it is shown that the witness has kept some gauge or has some knowledge on the subject, and on the ground that it is too remote, the area not being specified, and on the further ground that it is a matter of common knowledge that the rainfall over various areas differs materially.

Q. Mr. Birdsall, do you know what the average rainfall on the area of the watershed of the Byram river in
11a Westchester County north of the dam is for the last ten years? A. I do not.

Q. Do you know what the rainfall has been in any one of the last ten years on that area? A. I do not.

Q. Do you know what the average flow of the Byram river at that point has been?

Mr. DYKMAN—Objected to unless the point is specified.

Mr. WILLIAMS—At that point where the dam is.

Mr. DYKMAN—What dam? At the point where the City is building the dam?

Mr. WILLIAMS—Yes.

12a A. I do not.

Q. Do you know what the flow of water has been at that point at any time during the last ten years? A. I do.

Q. Are you able to give me the flow there at any particular time? A. Not at present, I am not.

Q. Will you at the next meeting bring with you a memorandum? A. I will, if necessary.

Mr. DYKMAN—I suggest you give him some memorandum of time.

The EXAMINER—He says any time; he has his option.

Q. Mr. Birdsall, are you acquainted with the property of the complainants on the Byram river? *A.* To a certain extent. 13a

Q. Do you know the frontage on the Byram river that the two complainants have? *A.* Yes.

Q. What is the frontage of Mr. Samuel Pine on the river, and on which side of the river is it? *A.* Does Mr. Pine now own the property that used to belong to James Wilson?

Q. Yes, that is it? *A.* The property of Samuel Pine is situated on the west side of the Byram river, in the State of Connecticut and runs along the same, taking the windings of the stream for 3,725 feet.

Q. What is the fall in the stream from the upper part to the lower part of Mr. Pine's land? *A.* Twenty-six feet and seven-tenths. 14a

Q. Will you explain how you get at that fall of twenty-six feet and seven-tenths? *A.* From the level of the bottom of the river at Mr. Pine's southern boundary to the level of the bottom of the river at Mr. Pine's northern boundary along said stream.

Q. Now, are you acquainted with the land of Mr. Frederick Muller on the Byram river? *A.* Yes, sir.

Q. Will you tell me how it is situated on the Byram river?

Mr. DYKMAN—Objected to, that it has no relation to the action in question, and on the further ground that it appears from the statement of the witness that Mr. Muller's lands do not form any part of and have no relation to the action in question, the Pine case. 15a

Mr. WILLIAMS—This action was brought by Samuel Pine and Frederick Muller against the City of New York; that an answer was filed by the City; that an argument for a preliminary injunction has been made, and an appeal was taken from the order made thereon, and no objection has been made to the joining together of the two plaintiffs before this, and furthermore, that

16a the witness has made no such statement whatever in regard to Mr. Muller's lands having nothing to do with this case.

The EXAMINER—Answer the question, Mr. Birdsall.

Mr. Dykman excepts.

A. The property of Frederick Muller is situated on the Byram river, about three-quarters of a mile north of the north line of Mr. Pine's; his property extends on both sides of the river for 920 feet; on the west side of the river for 450 feet further north.

Q. Does the other branch of the Byram river which rises in Connecticut join the Byram river at or near Mr. Muller's lands?

17a

Mr. DYKMAN—Same objection, and as incompetent, improper and immaterial.

Further examination adjourned by consent until Monday, November 15, 1897, at 3 P. M.

(Sgd.) GEORGE W. BIRDSALL.

Subscribed to before me this 10th day of November, 1897.

JAMES A. RENWICK,
U. S. Examiner.

18a

40

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and another

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

NEW YORK, November 15, 1897. 41

Hearing adjourned, at Mr. Dykman's request, until Tuesday, November 16, 1897, at 2.30 P. M.

NEW YORK, November 16, 1897.

Parties met pursuant to adjournment.

Present—The EXAMINER; Mr. WILLIAMS, for plaintiffs; Mr. DYKMAN (by representative), for respondents. 42

GEORGE W. BIRDSALL, direct-examination resumed:

By Mr. WILLIAMS:

Q. Have you brought with you the memoranda which I requested you to bring in relation to the flow of the Byram river? *A.* I herewith present a statement of the flow of the water over the weir on the Byram river at the Tunnel Reservoir, which is situated just above

the dam now constructed in the State of New York, which is from July 1, 1895, to December 5, 1895. The rainfall placed upon this statement is the rainfall at Kensico Dam, situated about six miles in a straight line from where the weir was placed (hands paper to plaintiff's counsel). 43

Plaintiffs' counsel offers the statement in evidence.

Marked "Plffs.' Exhibit Byram River Weir Overflow, Nov. 16/97."

Q. Have you made calculations from time to time in past years in regard to the quantity of water to be received from the various sources of water supply of New York City? *A.* I have. 44

Q. Have you ever made any estimate of the supply which you expected the City to derive from this dam across the Byram river?

Objected to by defendants' counsel unless it refers specifically to the property that is included in these proceedings.

A. I have.

Q. Will you tell me what your estimate is of the total supply which could be received in a year?

Same objection by defendants' counsel.

A. Not of the total quantity in a year; that is a mere matter of figures; I will generally state that from rivers in this neighborhood we can obtain an average of one million gallons per day per square mile of drainage area. 45

Q. Then would it be a reasonable assumption that you could obtain from this drainage area of 7.66 square miles an average of 7,660,000 gallons per day? *A.* With proper storage, yes.

Q. And with a sufficiently large outlet it could be stored elsewhere? *A.* Certainly.

Q. Are you acquainted with the watershed of that branch of the Byram river which flows into the

46 Byram river about three-quarters of a mile north of Glenville?

Objected to by defendants' counsel on the ground that this is a water supply in the State of Connecticut.

A. Only superficially.

Q. Well, will you give me as near as you can the watershed of that branch, or those branches, giving perhaps the largest and the smallest size that can be in your belief?

Same objection by defendants' counsel.

A. From what I have seen of the watershed and from the contour maps that I have seen, it ranges from
47 seven to twelve square miles.

Q. By that do you mean that the watershed in your opinion is not over twelve miles and not less than seven miles?

DEFENDANTS' COUNSEL—What watershed?

PLAINTIFFS' COUNSEL—The same watershed.

Same objection by defendants' counsel.

A. It is of what is generally denominated the East Branch of the Byram river, as near as my present knowledge gives me data as to same.

Q. Assuming that your estimate of the watershed is correct, what would you expect to be the flow of the water of the East Branch of the Byram river at the
48 point where it joins the Byram river?

Same objection by defendants' counsel.

A. It would come within the general terms which I stated in my former answer of one million gallons per square mile of drainage area per day.

Q. In this statement which you have submitted to-day, which shows the flow of water over weir on Byram river at Tunnel Reservoir, there is a column headed rainfall, and under it at various points the number of inches that fell on that day; did I under-

stand you that this rainfall was taken at a point six 49
miles from that spot? *A.* It was.

Q. Does this statement show the total flow of water at the point where the dam is? *A.* It does; there was about two hundred feet, I should think, between one and the other; we were constructing a new dam at the time, and this was a dam formed in order to move this waste weir and carry the water around the present new construction.

Q. Well, does not this statement show a materially less flow than 7,660,000 gallons a day? *A.* It does for that time.

Q. Would the same statement for the rest of the year, in your opinion, bring up the average so as to conform with your estimate of the average flow? *A.* 50
Very closely.

Q. Have you any such statement? *A.* I have not.

Q. Will you give me some information in regard to your reasons for believing that the flow during the remainder of the year would be larger than as stated in the statement? *A.* Generally the largest flow of a stream is during the months of January, February and March, when the ground is frozen and any rainfall or melting of snows goes directly off the surface into the stream and is not absorbed by the ground surrounding the same.

Q. Comparing the East Branch of the Byram river and the Byram river which rises in Westchester County, which would have the greater flow at their 51
point of junction?

Objected to by defendants' counsel on the ground that defendants are only to use this particular stream and not any other, and as incompetent and irrelevant

A. The main Byram river would have a larger flow than the East Branch.

Q. Will you give me as near as you can the difference?

Same objection by defendants' counsel.

52 *A.* I should say that the flow of the main branch would be about eight-twelfths the flow of the main stream, at the junction of the two streams.

Q. Will you explain your reasons for stating this, in view of the fact that you stated that you believed the watershed of the East Branch to be about equal to or perhaps one and three-quarters the size of the Byram river watershed north of the dam? *A.* Because there is a comparatively large watershed between the dam and the junction of the two streams, which would add fifty per cent. to the drainage area of the main stream and add nothing to my testimony as to the drainage area of the East Branch.

Q. Then the drainage area of the Byram river,
53 proper, north of the junction of the East Branch of the river to the dam, would be about three and three-quarter miles? *A.* Yes; that or nearly four square miles.

Q. Nearly four square miles; if the City of New York diverted all of the water which flowed into the reservoir formed by the dam which has been referred to, by how much would the flow of the Byram river be reduced at the point of junction of the East Branch with the Byram river, by which I mean before the East Branch has joined it and also after the East Branch has joined the river?

Objected to by defendants' counsel as incompetent and irrelevant, as no question of diverting the stream
54 is in this suit.

A. From my general knowledge of the run of streams, I would say that the amount would be decreased on the stream above the junction about one-half; below the junction, about one-fifth—no; I take that back; I will say one-quarter.

Q. On the last examination you testified that you were acquainted with the property of Mr. Pine, one of the complainants in this action, and that the fall in the stream from the upper part to the lower part of Mr. Pine's land was 26.7 feet; is there any water right on

that river that you know of which would preclude Mr. 55
Pine, in conjunction with his opposite neighbors, from erecting a dam 26.7 feet in height? *A.* There is.

Q. Where is that situated? *A.* Near the lower end of this property (referring to map); just below the lower end of his property, on the property of S. Reynolds and W. H. Craft.

Q. Do you know at what point Mr. Pine could erect a dam without encroaching upon that water right? *A.* I do not.

Q. Do you know whether the City has purchased that water right or the right to divert the stream in so far as that particular water right is concerned? *A.* It has paid all the damages for the diversion of the stream above the Connecticut State line to this water right. 56

Q. Have you ever measured or do you know the fall of the land between the little bridge which crosses the river from the road into Mr. Pine's place and the foot of his place? *A.* I have not.

Q. Are you acquainted with the value in money of water rights? *A.* I am not, except in exceptional instances, where I have had a chance to study them up.

Q. Are you acquainted with the values of water rights on the Bronx river prior to the diversion of that stream by the City? *A.* I say, only in exceptional instances.

Q. Are you acquainted with the values of water rights on the Byram river? *A.* I am not.

Q. Are you acquainted in a general way with the 57
prices paid by the City of New York for various water rights acquired on the Bronx river?

Objected to by defendants' counsel on the ground that it is not in this action, and on the further ground it is incompetent evidence.

A. I will answer the question by saying, I am not.

Q. Have you not been in the habit of making esti-

58 mates of the value of the water to be diverted? *A.* I have not.

Q. Have you made any estimates of the value of the water to be diverted from the various property-owners on the Byram river? *A.* I have not.

Q. How would you base a valuation of the water to be diverted in regard to the property of Mr. Pine or Mr. Muller, the complainants?

Objected to by defendants' counsel as to Mr. Muller's property, on the same ground that the testimony as to Mr. Muller's claim at the last session was objected to by Mr. Dykman.

A. I would have to make a detailed examination of
59 the ground, the possibility or probability of improving the same by establishing a power, and also with regard to what the lands and so forth of Mr. Pine were used for.

Q. Having made this examination and basing your report as to the value on it, would you regard your report as giving a definite, certain, fixed value which could be relied upon? *A.* No; it would be only my individual opinion; that is all.

Q. And would it be an opinion which would be subject to change by the changed conditions of the property of the riparian owner? *A.* Certainly.

Q. And your report made on your examination of to-day might vary materially if made a year from now? *A.* It might.

60 *Q.* What effect would the increased population of the valley of the Byram river south of the dam and the increased cultivation of the fields and the building of more houses have upon the flow of water in the stream?

Objected to by defendants' counsel on the ground it is too remote.

A. As regards the flow of water, it would not sensibly change that at all, and in regard to the quality of water, no doubt it would deteriorate same, and it might be eventually the same as it was on

the Bronx, that although the City of New York paid 61
water damages, and so forth, to mill owners along the Bronx, they have all been wiped out under the State Board of Health laws and paid nothing; a large amount of water power that we paid for along the Bronx has been entirely extinguished under the laws of the State Board of Health, for which they paid the property owners nothing.

Subscribed and sworn to before me this day of November, 1897.

Further hearing adjourned by consent to Tuesday, 62
November 30, 1897, at 2.30 P. M.

NOVEMBER 23, 1897.

Further hearing adjourned to Friday, December 3, 1897, at 2.30 P. M.

DECEMBER 3, 1897.

Further hearing adjourned to Thursday, December 63
9, 1897, at 3 P. M.

DECEMBER 9, 1897.

Further hearing adjurned to Wednesday, December 15, 1897, at 3 P. M.

64 DECEMBER 15, 1897.

Met pursuant to adjournment.

Present—The Commissioner and Mr. DYKMAN (by representative).

At request of Mr. Williams the hearing was adjourned until Wednesday, December 22, at 3 P. M.

DECEMBER 22, 1897.

Hearing adjourned to Wednesday, January 5, 1898,
65 at 3 P. M.

JANUARY 5, 1898.

Hearing adjourned without date.

66

UNITED STATES CIRCUIT COURT, 67

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

NEW YORK, March 24, 1899. 68

Parties met pursuant to notice.

Present—The EXAMINER; Mr. WILLIAMS, for plaintiffs; Mr. DYKMAN, for respondents.

It is stipulated, in so far as the form of evidence is concerned, that no objection will be made to it on the ground that the papers offered to-day are not the original papers.

Mr. WILLIAMS—I offer in evidence the minutes of the conference in the matter of claims by owners of property on the Byram river in the State of Connecticut for damages alleged to have been sustained by the 69
diversion of the waters of said river for use by the City of New York, dated April 28, 1897.

Also a letter from Charles H. T. Collis, Commissioner of Public Works, to Hon. Ashbel P. Fitch, dated April 20, 1897.

Also letter from Charles H. T. Collis, Commissioner, to Hon. A. P. Fitch, Comptroller, dated April 30, 1897.

70 And also letter dated June 23, 1897, from Eugene E. McLean, Engineer, to Hon. Ashbel P. Fitch, Comptroller.

NEW YORK, April 28, 1897, 11 o'clock A. M.

Minutes of a conference in the matter of claims by owners of property on the Byram river, in the State of Connecticut, for damages alleged to have been sustained by the diversion of the water of said river for use by the City of New York.

Present—Gen. CHARLES H. T. COLLIS, Commissioner of Public Works; GEORGE W. BIRDSALL, Chief Engineer of the Croton Aqueduct, and STEPHEN G. WILLIAMS, No. 45 Exchange place, representing property-
71 owners.

Mr. Birdsall said: For your understanding, I will state that the Byram river, from the dam at Portchester, where it enters the Long Island Sound, to the New York State line, is about 45,000 feet on each side. The City of New York has diverted the water from 8.66 square miles of the drainage area of this stream in New York just north of the Connecticut State line. The City of New York has settled, by private arrangement, with all the present mill owners on the stream, which involves to a certain extent the settlement of about 15,000 feet of this length of 45,000 feet of the Byram river. Of about 10,000 feet of the lower end
72 of this river one-half is in the State of New York and the other half in the State of Connecticut. North between this and the New York State line the whole of the river on both sides is in the State of Connecticut.

Gen. COLLIS—I understand it perfectly. The meanderings make this. What proportion have you settled?

Mr. BIRDSALL—We have settled with the mill owners.

Gen. COLLIS—What other riparian owners are there? 73

Mr. BIRDSALL—The parties who own land contiguous to the stream on both sides.

Gen. COLLIS—How does our taking of the water interfere with their use of it?

Mr. BIRDSALL—It diminishes the quantity of water flowing past them.

Gen. COLLIS—But they have the use of the water for agricultural purposes the same as ever?

Mr. BIRDSALL—Yes, sir.

Mr. WILLIAMS—Will you state how much you paid to those with whom you have settled?

Mr. BIRDSALL—We paid $379,000. 74

Mr. WILLIAMS—For about 15,000 feet?

Mr. BIRDSALL—A portion of that 15,000 feet is not fully settled for because the mill owners had rights of flowage and the adjoining owners have still to be settled with in some form or shape; there are about 100 of these that have an interest in the balance of the stream; most of them have small village lots alongside the flowage, so that they really have little interest; there are about thirty-five all told who have certain rights.

Gen. COLLIS—The City of New York has taken nothing but the use of the water?

Mr. BIRDSALL—No, sir; that's all.

Gen. COLLIS—We have not condemned or taken any 75 land?

Mr. BIRDSALL—No, sir.

Gen. COLLINS—And this water flows into one of our reservoirs?

Mr. BIRDSALL—It flows into the Kensico reservoir.

Mr. WILLIAMS—The City has caused it to flow there.

Gen. COLLIS—Are these claims over or below the point at which we have diverted the stream?

Mr. BIRDSALL—Below the point at which we have diverted the stream; above the point is in the State of

76 New York, where we have taken more or less land contiguous to the stream and are now taking more.

Mr. Williams—I represent some twelve or more owners of the land on the Byram river, in the State of Connecticut, holding, in all, upward of 18,000 feet on the river; desiring to arrive at a settlement in behalf of my clients without further litigation, I attend a meeting at the Commissioner's office, understanding that any statement made by me here will be regarded as made in an effort to arrive at a settlement without litigation, and will not be used against my clients in the event of litigation.

Gen. Collis—Certainly.

Mr. Williams—The owner of land on a river is legally
77 entitled to the flow of that river absolutely undiminished except as it may be diminished or retarded by an upper riparian owner for the usual agricultural or mill purposes; any diversion of the stream, carrying the water completely away from the river so that it cannot in any way get back into it is a violation of a property right which has been almost uniformly enjoined by the Courts.

Gen. Collis—Do I understand that the diversion of this stream takes all the water from the former bed of the river?

Mr. Williams—Roughly speaking, I understand that during nine or ten months of the year the diminution of the flow of the water through the river would be almost nominal; that during any period of the year when there
78 was a prolonged drought the flow of the river at the point where the dam was placed by the city would be practically stopped; I am trying to make this as fair a statement as I possibly can.

Gen. Collis—Do I understand that if we settle for damage we may have inflicted now, this is a settlement for all time, and that we get a release to that effect, notwithstanding the fact that at some future time we may be compelled to take even more water than we take at present?

Mr. Williams—Yes; the plan is to give a general

release of all our rights to any of the water which 79
may be diverted by the City. Under this the City will be permitted to take all the water north of its present dam, and might very possibly in the future take it all. As the preceding questions and answers show, it is possible, and perhaps probable, that in the future all of the water will be taken.

In behalf of two of my clients I brought suit for an injunction to restrain the City from taking or diverting any of the water of the river. I made a motion for a preliminary injunction before Judge Wheeler, of the United States Circuit Court, which was denied. I appealed on behalf of my clients from his order to the United States Circuit Court of Appeals, which, in its decision, while admitting all the legal arguments in 80
behalf of the complainants, stated that owing to the great public interests involved, it would be fair to appoint a master, and declared that it would appoint a master, but that my clients would not be bound to accept the order, but could have other remedies, namely, legal ones.

It is my intention, unless a settlement is effected otherwise, to bring this case to final hearing, and I hope eventually to obtain an injunction from the highest Court.

The City made, Mr. Birdsall says, a settlement with a number of the property-owners on the Byram river, and these property-owners were all mill-owners. In that settlement the City paid about $376,000, and ac- 81
quired some 15,000 feet of frontage on the river, leaving about 30,000 feet of frontage on the river without mill ownership at present. Now, the highest price which any one of the people I now represent has asked me to insist upon for him is $2 a running foot, and that goes down to as low as a dollar a running foot.

Mr. BIRDSALL—Is $2 a foot and $1 a foot for one side only or for both sides? Mostly your claimants own only on one side.

Mr. WILLIAMS—On one side of the river.

Mr. BIRDSALL—On both sides would be $4 a foot?

Mr. WILLIAMS—The average price at which my people are willing to settle would be about $1.50 a running foot for each side of the river.

Mr. BIRDSALL—My 45,000 feet is the river on one side, making 90,000 feet on both sides. We have settled for 15,000 feet, which really makes 30,000 feet if we consider both sides of the river.

Mr. WILLIAMS—I represent about 18,000 feet only on one side of the river.

Gen. COLLIS—Do you represent any clients through whose property this river runs, who have frontage on both sides of it?

Mr. WILLIAMS—Yes, but they would only claim for one frontage, I presume. Yet I don't put it that way. I claim for both frontages, but I reduce the amount per running foot, which produces the same result. I thought it would be simpler to take the basis per running foot and make the price lower per running foot if they owned on both sides of the river. What I am getting at is this, that in the settlement which has already been made with the City there remains in all about 60,000 feet to be settled for. If these owners were settled with on the basis of $1.50 per foot, it would take $90,000 to settle with them as against $376,000 paid for the other 30,000 feet, which seems a small sum, even although the owners already settled with had mill sites. This settlement with the mill-owners was made some ten years ago and they were paid. They have had the water flow, almost as it had been accustomed to flow, during some part of the time as it had been accustomed to flow, and had the benefit of the investment of their money for ten years. No effort had been made on the part of the City to make any settlement with any of the property-owners whom I represent. The City has deliberately attempted to take property belonging to my clients, who are citizens of another State and whose property is in another State. I have made in behalf of my clients, as Mr. Birdsall knows, and will, I am sure, corroborate me, a number of efforts during the past two

years or more to obtain a settlement of some kind with 85
the City, and I have repeatedly stated to Mr. Birdsall, to the Corporation Counsel, and endeavored several times to make the same statement to Gen. Collis, but never could get hold of him, that I was endeavoring to persuade my clients to accept something like a reasonable sum, urging upon them the fact that it was more or less of a necessity for the City, although the City could have taken the water from some other place, but that if the City were approached in a fair way, it would deal liberally with them; that there was no way in which the City could condemn the property and take the water, and that eventually the United States Court would enjoin the City from taking it until they paid or settled in some way, and it was not until I found my 86
patience exhausted that I was prepared to advise them, or any of them, to begin their action for injunction. Now the way in which we have based our damages is of course largely on conjecture. All the decisions of all the highest courts in England, New York State, Connecticut, and in the United States Courts, say that it is impossible to find out the damages to riparian rights, and the only way to grant the damaged party a remedy is by granting him an injunction, and if the United States Court follows the precedents laid down it will eventually grant an injunction in these cases. The Counsel to the Corporation states that he is distinctly of the opinion that the United States Court will never grant an injunction in such a case as this, but will 87
appoint finally a master to assess the damages, or refuse the injunction.

Mr. BIRDSALL—I will state that in the proceeding on the Bronx river for the payment of damages below our dam built at Kensico, and extending from Kensico to Williamsbridge, a distance of about 14 miles, the awards made to the riparian owners ran from 10 cents to $2.30 a running foot along each side of the stream.

Gen. COLLIS—Was this by amicable settlement?

88 Mr. Birdsall—By commission. I state this to show what we have paid before. This was land without any special water or mill powers, so that I think the measure of damages could be in most of these cases easily ascertained by merely comparing them with the amount we have paid through a Commission along the Bronx. In fact we had folks who obtained damages on the upper end of the Bronx, just below the dam, state before other Commissioners farther down the river, that they had as much water as they had before, even after the dam had been built, and that the damages paid for the lands immediately below the dam along the river were greater than they were at the lower end of the river. This, of course, was partially on account of hav-
89 ing had a chance to see what the effect of diversion of the water would be; and secondly, because as you get lower on the river, the drainage area is increasing, and the quantity of water running into the stream is increasing also. The drainage area is a big factor with regard to the steady supply of water in the lower stream on the Byram river. The large swamp through which we built our dam, and which is about two miles square of area just below our dam, acts as a sort of reservoir to to hold the water in wet weather and allows it to pass down, by percolation, into the stream in dry weather; so that the measure of damages through this swamp and contiguous to the mill ponds, for which we have made settlement for the power and diversion of the
90 water, will be very much less than that on the stream where there is a good fall and no other disturbing elements—subject, of course, to what water rights there may be still in the stream to build dams and use the water for power.

Mr. Williams—In answer to this it may be said that this is a settlement for all time. The factor for giving the stream a supply of water, namely a swamp, may be no longer a factor some years hence, as that swamp may be so drained that it would be of no benefit whatever to the river, and it is ques-

tionable whether the water would be healthful if the 91
flow were confined, during certain seasons of the year, to that alone. The use of the water of the stream is, by authority of Chancellor Kent, confined not only to its practical uses, but even to its use as a beautiful thing of nature, and the damages are reasonable when they are paid for that loss. The land along this river is largely at present used as farming land. A railroad has been projected through this valley and may perhaps never be completed, but a trolley road is already under construction. The hills on either side of this river have fine building sites overlooking the Long Island Sound, and some of these are already occupied by buildings of the most expensive character, and land within a short distance of this river has sold at as high 92
a rate as one thousand dollars per acre for building sites for wealthy New York citizens and others. A considerable, or at least a large part of the value of some of these places is made up from this stream running through it.

In the case of Mr. Samuel Pine, one of the people I represent—there is on his land a valuable feldspar deposit, and he has erected a mill where he grinds the feldspar, and he supplies the power with water from the river; on the opposite side of the river from him is another feldspar deposit on the property of the estate of J. T. Pentz, of which I am the administrator and representative, and it has been suggested that it would be advisable for Mr. Pine and the estate of J. T. Pentz 93
to build a dam for the purpose of developing these quarries of feldspar. This feldspar deposit is of considerable commercial value and, if properly developed, the industry would receive considerable benefit if the material could be crushed and ground by water power. I think that is true from what I know.

Mr. BIRDSALL—It is of no value unless ground.

Mr. WILLIAMS—Under the laws of the State of Connecticut parties can erect a dam and flow their neighbors' land and make compensation to them as

94 awarded by a Commission appointed by the courts. In view of the fact that the parties represented by me are citizens of Connecticut, that they have come willingly to the City to endeavor to make settlement with them rather than to litigate the matter, and in view of the fact that it is impossible for the City to condemn this property and take it under any statute, I think that the City should make a more liberal offer of settlement than they would in the case of a proper owner being a citizen of the State of New York, with the property in the State of New York, which they could condemn by public proceedings.

95

DEPARTMENT OF PUBLIC WORKS,
COMMISSIONER'S OFFICE,
No. 150 Nassau Street,
NEW YORK, April 20, 1897.

Hon. ASHBEL P. FITCH,
Comptroller:

DEAR SIR—In the matter of the suit brought in the United States Circuit Court by the owners of riparian rights on the Byram river in the State of Connecticut, to enjoin the City of New York from diverting the water of that river from its use, the Counsel to the Corpora-
96 tion advises me that, some time prior to the hearing of the motion for the injunction, a settlement, or at least an authoritative effort at settlement of the claims of these owners should be made on the part of the City.

I fully concur in his views, as expressed in his letter of the 12th instant, of which I inclose a copy, and have requested Mr. Stephen G. Williams, of Moran & Williams, No. 41 Wall street, who represents the plaintiffs and the owners of a large part of the river frontage in Connecticut, to join in a meeting at this

office for that purpose at his earliest convenience 97
Chief Engineer Birdsall will be present with the necessary maps of the river and the property. As the law requires your assent to any such settlements, it is desirable, for the purpose of expediting the proceedings, and to give them the full weight as evidence in Court, if necessary, that you be present at the meeting in person or by authorized representative. I would therefore ask you to advise me at once if you are willing to be present or represented at such a meeting, and to name the earliest day of your convenience for the same.

Yours respectfully,

(Signed) CHARLES H. T. COLLIS,
Commissioner of Public Works. 98

(Copy.)

DEPARTMENT OF PUBLIC WORKS,
COMMISSIONER'S OFFICE,
No. 150 NASSAU STREET,
NEW YORK, April 30, 1897.

MY DEAR SIR—I have the honor to inclose you a memorandum of a discussion which recently took place before me, in regard to the claims by owners of property on the Byram river in the State of Connecticut, for damages alleged to have been sustained by the 99
diversion of the water of said river for use by the City of New York.

When you have read the inclosed, I shall be glad to confer with you in regard to the same.

Yours truly,

(Signed) CHARLES H. T. COLLIS,
Commissioner.

Hon. A. P. FITCH,
Comptroller.

100 (Copy.)

JUNE 23, 1897.

HON. ASHBEL P. FITCH,
Comptroller.

SIR—In the matter of compensation to land-owners on the Byram river, on account of their riparian rights being interfered with by the diversion of the waters of the river, above the dam, I have the honor to report:

The Byram river, rising in this State, runs in a southerly direction, partly through New York, and partly through Connecticut, to the Sound, which it empties into at Portchester.

101 Just north of the Connecticut State line the city has built a dam, and diverted the waters of the river by a tunnel and waterway, carrying them into Kensico Reservoir. The watershed of that part of the river north of the dam is $8\frac{66}{100}$ square miles, and the amount of water so diverted is estimated at about 7,000,000 gallons per day.

The Byram river from the dam at Portchester where it enters the sound, to the New York State line, is about 45,000 feet on each side.

The City of New York has settled, by private arrangement, with all the present mill-owners, which involves, to a certain extent, the settlement of about 15,000 feet of this length of 45,000 feet, of about 10,000
102 feet of the lower end of the river, one-half is in the State of New York, and the other half is in the State of Connecticut. The sum of $379,000 has been paid to the mill owners in this lower 15,000 feet, but this does not settle with the property owners. The mill owners have the right of flowage, but the rights of the adjacent owners remain to be settled with in some way for the riparian river rights.

Between this 15,000-foot point and the State line, where the stream is entirely within the State of Connecticut, are located the claimants against the

State of New York for damages on account of the diversion of the waters of the river. The distance is about 30,000 feet on east side, making 60,000 feet in all on both sides.

The legal aspects of the matter are presented by the Counsel to the Corporation in a communication to Commissioner Collis, under date of April 12, 1897.

The Counsel says the City is "being sued in the "United States Circuit Court for an injunction to pre- "vent such a use of the dam now building on the West "Branch of the Byram river as would cause a diminu- "tion of the flow of that river through the State of "Connecticut.

"A motion for a temporary injunction was denied "by Judge Wheeler of the United States Circuit Court, "and an appeal from such denial, taken by the plain- "tiff, is now pending in the Circuit Court of Appeals, "and will probably be reached in a short time.

"Although we have been, thus far, successful, and "have no reason to expect an adverse decision as far "as the temporary injunction is concerned, yet I can- "not say that the case is free from damage when it "shall come to be submitted to the Court upon the trial "of the action.

"*Undoubtedly the right of the riparian owner to an un- "diminished flow of the stream is a property right which "we have no right to deprive him of without making com- "pensation*, and we have always been willing to make "such compensation, if a reasonable basis of settle- "ment could be arrived at."

As we *cannot condemn* property rights under a New York statute, and as there is no statute of Connecticut authorizing us to condemn property for the benefit of a New York municipality, "there is no way in which "we can compel a judicial determination as to the value "of the property rights we are about to destroy." The Counsel says there is nothing to do except to try to arrive at an agreement with the claimants, or else to wait till we "are sued for an injunction, and then come

106 "into Court asking that the amount of damages be "ascertained in some judicial manner, consenting that, "when it be so ascertained, an injunction issue, unless "we pay such damage."

The Counsel says to the Commissioner, "You have "ample power under the law to settle claims for dam- "ages of this character," and states that "one of the "agreements addressed to the Court in opposition to "an injunction has been that the plaintiff failed to "show that he had made any attempt to settle with "you."

The Counsel then says that Mr. Stephen G. Williams, of the firm of Moran & Williams, called upon him and said that he represented the owners of about eighteen
107 or twenty thousand feet of frontage upon the river, and that he desired "to agree with you upon a sum per "foot in settlement of the claim of the owners of all this "property."

He says he thinks it would be wise to pay "a some- "what larger sum, by way of damage, than we would "consent to pay in a similar case if the property affected "were situated in this State, and we could proceed to "condemn it."

He finally says: "In any event, I think it would be "wise if you were to send for Mr. Williams and try to "agree with him upon some basis of settlement of these "claims, so that it shall not be said that we were un- "willing to make any attempt to settle."

108 A meeting was held by Commissioner Collis at his office, at which were present, besides himself, Mr. George W. Birdsall, Chief Engineer, Croton Aqueduct, and Mr. Stephen G. Williams, representing the property-owners.

In the minutes of that meeting occurs the following in the statement of Mr. Williams, page 5:

"Now, the highest price which any of the people I "now represent has asked me to insist upon for him is "$2 a running foot, and that goes down as low as a "dollar a running foot.

"Mr. BIRDSALL—Is $2 a foot and $1 a foot for one 109
"side only or for both sides? Mostly your claimants
"own only on one side.

"Mr. WILLIAMS—On one side of the river.

"Mr. BIRDSALL—On both sides would be $4 a foot.

"Mr. WILLIAMS—The average price at which my
"people are willing to settle would be about $1.50 a
"running foot for each side of the river.

"Mr. BIRDSALL—My 45,000 feet is the river on one
"side, making 90,000 feet for both sides. We have
"settled for 15,000 feet which really makes 30,000 feet,
"if we consider both sides of the river.

"Mr. WILLIAMS—I represent about 18,000 feet only 110
"on one side of the river.

"Gen. COLLIS—Do you represent any clients through
"whose property this river runs, who have frontage on
"both sides of it?

"Mr. WILLIAMS—Yes, but they would only claim for
"one frontage I presume. Yet I don't put it that way.
"I claim for both frontages, but I reduce the amount
"per running foot, which produces the same result. I
"thought it would be simpler to take the basis per
"running foot and make the price lower per run-
"ning foot if they owned on both sides of the river.
"What I am getting at is this, that in the settlement
"which has already been made with the City there re-
"mains in all about 60,000 feet to be settled for. If 111
"these owners were settled with on this basis of $1.50
"per foot, it would take $90,000 to settle with them, as
"against $376,000 paid for the other 30,000 feet, which
"seems a small sum, even although the owners already
"settled with had mill sites."

On page 7 of the Minutes Mr. Birdsall says:

"I will state that in the proceeding on the Bronx
"river for the payment of damages below our dam,
"built at Kensico, and extending from Kensico to
"Williamsbridge, a distance of 14 miles, the awards

112 " made to the riparian owners ran from 10 cents to
" $2.30 a running foot, along each side of the stream.

" Gen. COLLIS—Was this by amicable settlement?

" Mr. BIRDSALL—By commission."

This is all that is recorded bearing definitely on the measure of damages. Mr. Williams, representing some twelve or more owners of land, holding, in all, upwards of 18,000 feet on the river, may be considered as offering the price of $1.50 per foot on each side of the river, as a fair adjustment for the damage caused by the diversion of the waters.

The Counsel to the Corporation says there is no doubt of the liability of the City for these damages.
113 Being in Connecticut there is no judicial means by which the value can be ascertained. The standing offer of the Department of Public Works of 50 cents per foot has in no case been accepted.

It is impossible to estimate with any reasonable exactness the value of such damages, but to get rid of troublesome and expensive suits and, at the same time, to show a willingness to pay a reasonable and just amount, I think the City would be justified in making the liberal offer of $1.50 per linear foot on each side of the river for the part between the dam on the state line and the part already paid for, being about 60,000 feet, both sides of the river; and 50 cents per running foot for the riparian rights of property owners, about
114 15,000 feet on the easterly side, and 5,000 feet on the westerly side, 10,000 feet on the westerly side being in the State of New York. Our settlement with the mill owners did not include these riparian rights.

This offer, being liberal, will probably result in the purchase of all these claims; any less offer I do not think would.

If the owners should not be satisfied with the offer, we would be able to go into court with the proper show of willingness to pay what is just and fair.

Respectfully,

EUGENE E. MCLEAN,
Engineer.

Mr. DYKMAN—Objected to on behalf of the City of New York, on the ground that this action was commenced and the complaint verified on the 24th of March, 1896. That the minutes show that the meeting of April 24, 1897, was a meeting evidently held for the purpose of an attempt at settlement; that any conversation which might have been had by the Chief Engineer of the Croton Aqueduct or by the Commissioner of Public Works with counsel for Mr. Pine in this proceeding can have no effect on the issue herein, and on the further ground that all such conversations and conferences were had and taken without notice to the Corporation Counsel of the City of New York; that he was not represented at such proceedings and had no notice of the same, and that all of the minutes of such conference were incompetent, improper and immaterial, and that the statements contained therein could only be used in contradiction or impeachment of General Collis or Mr. Birdsall, if they had been sworn on behalf of the defendant herein. That the letter to Mr. Fitch under date of April 20, signed by Charles H. T. Collis, is also incompetent and immaterial. 115 116

And on the further ground that the facts stated by Commissioner Collis in his letter of April 20, prior to the passage of the new Charter of the City of New York, cannot at this date have any effect whatever. There is now no power vested in the Commissioner of Public Works and the Comptroller to acquire any real estate whatever except with the approval of the Board of Estimate and the Board of Municipal Improvement. 117

And on the further ground that the communication under date of April 30, 1897, signed by the Commissioner of Public Works, simply called the attention of the Comptroller to a discussion which cannot be considered as evidence on the part of any party in this proceeding.

The same objection is made to the communication of the Comptroller, dated June 23, 1897, signed by Eugene E. McLean, Engineer, and on the further ground

118 that McLean, although an engineer in the employ of the Comptroller's office, had no power to bind the City, and that since the date of his letter the power of settlement has been taken from the hands of the Comptroller and the Commissioner of Public Works, no proceeding having been instituted as required by the Charter to continue the right in the City officials to acquire these lands under that statute.

Further hearing adjourned to Friday, April 14, same place and hour.

119

SAMUEL PINE and another

against

THE MAYOR, ETC., OF NEW YORK.

NEW YORK, May 5, 1899.

TESTIMONY FOR COMPLAINANTS, TAKEN BEFORE JAMES A. RENWICK, ESQ., EXAMINER.

120 Appearances—Mr. WILLIAMS, for complainants (Mr. CHARLES C. MARSHALL, of counsel); Mr. HENRY T. DYKMAN, for defendants.

GEORGE W. BIRDSALL, recalled on behalf of the complainants:

By Mr. MARSHALL:

Q. Mr. Birdsall, you have testified, have you not, that the drainage area north of the State line, where

the Byram river, or the West Branch of the Byram river crosses the Connecticut line, is about 8.66 square miles? *A.* Yes, sir. 121

Q. And then that the drainage area between that point where the river intersects the Connecticut State line and a point just above the junction of the East and West Branches of the Bryam river is about four square miles? *A.* Yes, sir.

Q. So that those two drainage areas would make 12.66 square miles? *A.* Yes.

Q. Then you have testified that your estimate of the water flow there to-day is about one million of gallons per square mile?

Mr. DYKMAN—The record shows what he swore to. 122

Q. Then the flow estimated there by you would be something over 12,000,000 gallons per day?

Objected to by Mr. Dykman as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness, and no definite period of time stated.

A. Yes, sir.

Q. You testified that if the City of New York diverted all of the water which flowed into the reservoir formed by the dam that the decrease in the flow of the Byram river just above its junction with the East Branch would be about one-half?

Same objection. 123

A. That I don't remember.

Q. Will you give us your opinion on that point?

Same objection.

A. Well, it would be at least one-half.

Q. Isn't it your opinion that it would be on the basis of those figures which you have stated nearer two-thirds than one-half?

Same objection.

124 *A.* It would be somewheres between two-thirds and one-half.

Q. It might be as much as two-thirds on the basis of those figures?

Same objection.

A. It might.

Q. Now, you have testified that the drainage area of the East Branch is from seven to twelve square miles, have you not?

Objected to by Mr. Dykman on the ground that the East Branch is below the dam and in the State of Connecticut, and below the reservoir which the City of
125 New York owns.

A. Yes, sir.

Q. Now, assuming that this diversion at the dam takes place, that we have stated above, isn't it your opinion that the flow in the Main Branch of the Byram river, below the junction, may be decreased as much as one-third?

Objected to as clearly immaterial, his opinion of what may happen, and as incompetent and improper.

A. All I can say, I do not know enough of the topography of the East Branch, especially not knowing its actual drainage area, there being a disputed point as
126 to certain portions of that drainage area, whether it drains into the East Branch or whether it drains into the Mianus; therefore, I could not answer this question

Q. What is your opinion as to whether the drainage area of that East Branch is nearer seven square miles or twelve?

Objected to on the ground that the East Branch is far below the dam, that it strikes the Byram river some miles below the State line, and has never been interfered with by the City of New York.

A. That was the point which I called your attention to in my former answer, and I have seen no surveys—accurate surveys which would determine that point. 127

Q. Then you cannot say whether it is nearer seven or twelve? *A.* No, sir.

Q. You remember testifying on an earlier hearing in this case that the decrease in the flow of the main river below the junction of the East and West Branches would be decreased under the circumstances which I have stated about a quarter?

Objected to on the ground that the City of New York, by deeds from Russell, Birdsall and Ward, Tingue, House & Co. and Reynolds and others, acquired those rights, and the Statute of Limitations runs against them, sixteen years having elapsed since said deeds. 128

A. With regards to the amount from the City's dam north, I did make that statement.

Q. Can you explain to us what you mean by those words "with regards to the amount from the City's dam north"? *A.* That is, comparing the amount from our dam—the amount of water obtained from our dam north, and the amount obtained below the East Branch of the Byram river, on the stream itself, I made the statement as you said, that it would be about one-quarter the amount diverted.

Q. Now, Mr. Birdsall, if the decrease just above the junction, under the circumstances I have stated, is as much as two-thirds, then the decrease below the junction, in the main branch, under the same circumstances, would be more than a quarter? 129

Objected to, that there is no proof of that here.

A. Taking the basis of the East Branch of Byram river——

Q. May I interrupt you? I think I am entitled to an answer, yes or no.

Question repeated.

A. Yes.

130 *Q.* Mr. Birdsall, the West Branch of the Byram river rises from the Wampus Lake and Byram Lake, does it not? *A.* Those are the head waters.

Q. What lakes form the head waters or contribute to the flow of the East Branch? *A.* That I don't know.

Q. Are there any lakes that contribute to the flow of the East Branch? *A.* Not that I know of.

Q. You would know if there were any lakes? *A.* I would not; no, sir.

Q. You can tell by examining the topographical map of the State of Connecticut for us, couldn't you?

Objected to on the ground that it calls for the examination by the witness of a map in evidence and not
131 proven to be accurate.

A. Well, I don't know; there might be a large swamp that might have a lake just before; I would want to drive over the ground myself to know it.

Q. Eliminating the question of a swamp, or the possibility of a swamp, can you not tell us whether that East Branch rises from or is contributed to by any lakes in the State of Connecticut or New York.

Objected to that it is immaterial where it rises.

Q. What is your opinion?

Same objection.

132 *A.* Depend upon the map.

Q. You know the topographical map, do you not, of the State of Connecticut? *A.* Who is it made by?

Q. U. S. Geological Survay, in co-operation with the State of Connecticut? *A.* Yes, I know that map.

Q. Now, won't you look at this page 31 and tell me whether the East Branch is fed by any lakes as appears from that map.

Same objection, and the further objection that the map does not show upon its face the meaning of the various colors and the various lines.

A. According to this map there is only one small pond feeding the waters of the East Branch. 133

Q. And what is that small pond? *A.* I don't know its name.

Q. Have you ever driven down the banks of the East Branch? *A.* I have driven over the roads that were supposed to be there.

Q. Did you ever see any lakes contributing to the flow of the East Branch of the Byram river? *A.* I did not.

Q. What is the size of Wampus Lake? *A.* About twenty acres.

Q. And what is the size of Byram Lake? *A.* Originally?

Q. Well, what is its present size?

134

Objected to on the ground that Byram Pond is not a lake and was created by Russell, Birdsall & Ward and others, who purchased the right in 1864 and 1866 to increase the superficial area on two different occasions and built the pond, and that Byram Pond as it now exists is not what is generally known as Byram Pond and that these persons purchasing these rights now owned by the City owned the right to dam the waters back to the extent of their deeds, and also objected to as too remote.

Q. Mr. Birdsall, will you give us the size of Byram Lake at the time that the City of New York commenced the construction of the dam involved in this suit?

135

Objected to on the ground that there is no Byram Lake; it is a storage reservoir which the City purchased, Byram Pond having been obliterated.

A. When full, it covered about one hundred and twenty acres.

Q. How are these lakes fed, the Wampus Lake and the Byram Lake; are they fed by springs? *A.* No, sir.

Q. Are there any springs in them? *A.* No, sir.

136 *Q.* How are they fed? *A.* By rainfall and the water coming off the adjacent hills and watershed.

Q. And only by rainfall? *A.* That is all.

Q. Now, when you testified as to the drainage area of the river north of the Connecticut State line, near the dam, you included in the 8.66 square miles, the watershed which supplies those lakes? *A.* Yes, sir.

Q. What was the purpose of this dam erected at the State line?

Objected to as immaterial.

A. To divert the water of same into the Kensico Reservoir.

137 *Q.* How far is the Kensico Reservoir from the dam? *A.* About five miles.

Q. Is there a diversion by a natural or artificial channel? *A.* Partially natural and partially artificial.

Q. Within the State of New York has the City of New York, to your knowledge, taken condemnation proceedings along the line of the Byram river and its branches.

Objected to as not the best evidence, the condemnation proceedings being a matter of public record.

A. We have filed maps for more or less of the property.

Q. Under the condemnation law you have done that? *A.* Yes, sir.

138 *Q.* Do you remember whether the law under which you acted there is chapter 445 of the Laws of 1877?

Objected to as calling for a conclusion.

A. Yes.

It is stipulated that on page 8 of the testimony taken on hearing of November 8, 1897, the law referred to as

chapter 445 of the Laws of 1887 of the State of New 139
York, should be chapter 445 of the Laws of 1877.

Q. Mr. Birdsall, that dam can divert 8,000,000 gallons a day?

Objected to as incompetent and immaterial.

A. Yes.

Q. Prior to the construction of that dam, all the water which flows into the reservoir formed by that dam flowed by the lands of Mr. Muller and Mr. Pine, plaintiffs in this suit, did it not?

Objected to. Counsel should state which dam—whether the City's dam or the Byram Pond Dam.
140

Q. (Continued) I am talking about the dam near the State line—the City dam I mean; the dam about 500 feet from the State line. *A.* At certain seasons of the year, yes; at other seasons of the year, no.

Q. Now, if there was any water that didn't flow by the lands of Mr. Pine and Mr. Muller prior to the construction of that dam, where did it go? *A.* It was absorbed by the big swamp just below the dam.

Q. Mr. Birdsall, do you consider yourself an authority on the value of riparian rights?

Objected to, as calling for the opinion of a witness on his own competency, and further that it is too remote.
141

A. I should say no.

Q. What is the approximate cost of this dam to the City of New York; I mean the dam about 500 feet from the State line?

Objected to as incompetent, immaterial and improper.

A. The dam, as a dam alone, without any of its appurtenances, cost about $45,000.

142 *Q.* Now, the dam and the work connected therewith has cost the City of New York upward of what?

Same objection, and further, it is too remote.

A. You mean the whole thing; the proceedings to get the water into Kensico?

Q. Did you not state that the dam and the work connected therewith had cost the City upward of $1,000,000? *A.* Well, it depends upon whether—I don't think under such a question as that I ever made that remark.

Q. Will you read from this affidavit and see: (Reading) "A dam is in process of construction in the State of New York, in the County of Westchester, a
143 short distance from the dividing line between the States of New York and Connecticut, but the said dam is not completed; said dam and work connected therewith has already cost the City of New York upward of $1,000,000, and will cost the City much more"; you remember making that affidavit on the 23d day of April, 1896, before G. L. Sterling, Notary Public, New York County? *A.* Yes.

Q. It was true, was it? *A.* That is to get that water to New York, entirely; the whole thing.

Q. Your statement on that point was fairly reliable and accurate, was it not?

Same objection.

144 *A.* Including taking the water to New York.

Q. Now you remember stating in that affidavit that you had made a careful estimate of the damages which would be suffered by the said complainants if all of the water of the said westerly branch of the Byram river should be diverted into the Kensico reservoir, and you estimate the damage to the said complainant Pine will be $1,862.50; you remember making that statement?

Objected to as incompetent, improper and immaterial, and on the further ground that no opinion ex-

pressed by the Engineer of the City Government would 145
bind the City in any event, the City having no general agents.

A. Yes.

Q. And you remember stating that the damage to the complainant Muller would be $572.50?

Same objection.

A. Yes.

Q. Now, that statement was not intended by you to be a definite or reliable one, was it? *A.* From the facts in my possession.

Q. Well, if you were not a judge of riparian rights or values, your testimony on that point wasn't to be 146
taken as reliable, as your statement on the cost of the dam, for instance?

Same objection.

A. No, because one I knew all about, and the other I knew only partially.

Q. You are acquainted with the Town of Portchester, are you not? *A.* I am.

Q. Do you know about what its population is? *A.* No; I couldn't say; I think about 3,000 to 4,000.

Q. You never have examined that? *A.* No.

Q. Is the topography of the country in the valley of the Byram river such that the Byram river flows towards and through Portchester? *A.* It flows into 147
a branch of the sound at Portchester.

Q. Is the topography of the country—the grade line—such that the water of the Byram river could be conducted by gravity to the Village of Greenwich?

Same objection, as incompetent and immaterial.

A. Some portions of it.

Q. What portions of it?

Objected to as incompetent, improper and immaterial.

148 *A.* Those portions of it which were higher than the highest ground there is in the Town of Greenwich.

Q. Mr. Birdsall, it is true, is it not, that the whole of the Village of Greenwich lies lower than the Byram river at the land of Mr. Muller and Mr. Pine?

Objected to as incompetent and immaterial.

A. I don't know.

Q. Can you give us your opinion on it? *A.* I don't know, because I do not know the limits of the Town of Greenwich; I know a man that lives in the Town of Greenwich, and he is seventy-two feet above the tide.

Q. You know what the elevation is above sea level at the lands of Mr. Pine? *A.* I do not; that is, I
149 don't remember.

Q. Well, do you think it is as much as 300 feet? *A.* I know it is not 300 feet, because I know the level of my dam and I know what that is, and I know what they are; I don't know what the difference is.

Q. Do you think it is as much as 200 feet? *A.* I doubt it.

Q. Would you say that it wasn't? *A.* No, sir.

Q. Now, Mr. Birdsall, is the water from the West Branch of the Byram river, that you have testified is diverted by this dam, of any value to the City of New York?

Objected to as not the way to prove its value; ques-
150 tion withdrawn.

Q. You understand the nature of this action, do you not, or suit? *A.* I do.

Q. You know it is a suit for an injunction to prevent the City from diverting the water? *A.* Yes.

Q. Now, I simply ask you if there is any value in it to the City of New York?

Same objection, and further that there is no limit fixed when.

Mr. MARSHALL—Well, now.

A. Yes.

Q. Do you know what the City of New York charges by meter for Croton water?

Objected to as incompetent and improper.

A. I do.

Q. What is it?

Objected to as too remote, and not stating under what circumstances, whether for factories, hotels or private houses.

A. For all business places, 10 cents per 100 cubic feet.

Q. How many gallons in 100 cubic feet? *A.* About 748.

Q. Now, what other meter charge is there? *A.* That is the only meter charge.

Q. How do you base the charge for private dwellings?

Same objection.

A. Depends upon the size of the dwelling and number of families in it.

Q. Where there is no meter? *A.* Where there is no meter; there is very few meters in private houses; it depends upon the size and the number of families in the house.

Q. In your opinion is the charge for private dwellings where there is no meter substantially the same as the meter charge?

Same objection.

A. No.

Q. What is the difference? *A.* I should say about one-half.

Q. In favor of which? *A.* In favor of the private dwelling.

154 *Q.* The private dwelling is about one-half cheaper? *A.* Yes.

Map heretofore referred to and shown witness is marked "Complainants' Exhibit 1 for identification, May 5, 1899."

Complainants' counsel offers said map in evidence.

Objected to as immaterial, incompetent and improper; that there is no proof here of its accuracy, and it is not a public record.

Q. Mr. Birdsall, you referred to another dam up in this locality; what dam is that? *A.* The dam at
155 Byram Pond.

Q. Now, won't you tell us just where that is? *A.* It is about 400 feet south of the entrance of old Byram Pond.

Q. And on the pond or on the river? *A.* On the river and covers the pond.

Q. How long has that dam been there? *A.* Finished about a year ago.

Q. When was its construction commenced? *A.* About two years ago.

Q. Was it commenced after or before the construction of this dam down near the Connecticut State line? *A.* After.

Q. Under the same statutes? *A.* Yes.

156 *Cross-examined* (by Counsel for Defendant):

By Mr. DYKMAN:

Q. Mr. Birdsall, where is Byram Pond proper, in what town and in what State? *A.* In the State of New York; partially in Bedford and partially in Northcastle.

Q. Do you remember any transactions with Russell, Birdsall & Ward, Tingue, House & Co.?

Objected to by complainants' counsel as immaterial and irrelevant.

A. I do. 157

Q. How long ago? *A.* About 1884.

Q. So far as Wampus Pond is concerned, what action if any, has the City taken towards diverting its waters? *A.* None at all.

Q. Do you remember the heights of Byram Pond and the dam at or about the time of the City's transactions with these firms, the height of the dam?

Objected to as incompetent and immaterial.

A. I do.

Q. How much higher have you built it—meaning the City? *A.* Three and a half feet.

Q. That is the old dam? *A.* It is just above the old dam. 158

Q. All the action of the City has been above the East Branch of the Byram, has it not? *A.* It has.

Q. And in the State of New York? *A.* Yes.

Q. Byram Pond is formed, is it not, by streams and by the drainage area inside of the State of New York? *A.* It is.

Q. And Wampus Pond also? *A.* Yes.

Q. The plaintiffs in this action reside in the State of Connecticut, or their land is in the State of Connecticut? *A.* To the best of my knowledge.

Q. And all the water that you have diverted has arisen in the State of New York by drainage area or by springs? *A.* It has.

Q. And the land you have acquired has been within 159 the State of New York, has it not? *A.* It has.

Q. Your diversion has taken place in the State of New York? *A.* It has.

Re-direct (by Complainants' Counsel):

By Mr. Marshall:

Q. Won't you please tell us what you mean by the old dam? *A.* The old dam built by Russell, Birdsall & Ward, and Tingue, House & Co., and Wilcox & Co.

160 *Q.* Won't you tell me what you meant when you said that no action has been taken by the City in diverting the waters of Wampus Pond? *A.* It has built no dam or done anything with it; we left it as it was.

Q. But the water of Wampus Pond or lake flows into the Byram river above the dam? *A.* It does.

Q. And therefore any water that flows from it is diverted or may be diverted by the City? *A.* May be diverted by the City.

Q. Mr. Birdsall, in regard to this old dam which was built by Russell, Birdsall and those others, for what purpose was that built? *A.* It was built as a storage reservoir.

Q. And what was the object of these people having a
161 storage reservoir? *A.* So as to collect water in the wet season to use in the dry season for the purposes of their mill.

Q. The result being that the flow of the river was more uniform than it otherwise would have been? *A.* Yes.

Q. And in consequence thereof there wouldn't practically have been a time when the stream would have been dry?

Objected to.

A. I can't imagine the stream being dry at any time.

Q. From that old dam, after the water that was con-
162 fined by the old dam was used it flowed on down the Byram river? *A.* It does.

Q. After the water is used where you have confined it by the City dam, near the State line, it is diverted entirely from the course of the river, isn't it? *A.* It is.

Q. Is that dam in operation? *A.* It is.

Q. Diverting water now? *A.* It is.

Q. How long have you been diverting water? *A.* About two years last December.

Q. Is it your intention to divert water there con- 163
stantly?

Objected to.

Mr. MARSHALL—The intention is admitted in the answer.

Q. Is it your intention to divert it all the time, the year around? *A.* More or less of it.

Q. And more at one season than another? *A.* In quantity, yes.

Q. What season? *A.* In the winter season we divert most of it.

Q. You don't need it in the summer? *A.* Yes, sir.

Q. You divert it in the summer too? *A.* Yes. 164

Q. Any water flowing over the dam now; over the dam near the State line? *A.* No, sir.

Q. None flowing over now at all? *A.* No, sir.

Re-cross (by Defendant's Counsel):

By Mr. DYKMAN:

Q. Mr. Birdsall, you remember, do you not, the transactions between the City and Wilcox, Reynolds, Tingue and other mill-owners along the stream? *A.* I do.

Q. And they built a dam there, did they not; raised the dam at Byram Pond? *A.* They did.

Q. When they were filling that dam, did the water 165
run over the property belonging to the plaintiff in this action? *A.* It did not.

Q. For how many years did that state of affairs exist? *A.* To the best of my knowledge about seven years.

Q. There was a dam, was there not, an original dam at Byram Pond built by Reynolds, Wilcox & Co.? *A.* I don't know whether Reynolds was in it; Wilcox & Tingue, House & Co. were in it, and Russell, Birdsall & Ward.

166 By Mr. MARSHALL:

Q. By this dam you mean the old dam, to which you have already referred? *A.* Yes.

By Mr. DYKMAN:

Q. According to your best recollection, the City of New York now owns the fee of the land on which that dam was built, do they not? *A.* It does.

Q. Purchasing it from the persons who built it? *A.* Yes.

Q. And paying for it? *A.* Yes.

Q. About how many years ago? *A.* I think it was paid for in 1884; the payments might have been delayed in the Comptroller's office.

167

By Mr. MARSHALL:

Q. Well, you don't know that they were? *A.* No; the vouchers were made out in my office in 1884 for the payment of those things.

By Mr. DYKMAN:

Q. And Byram Pond, as I understand it, is a pond fed by natural streams or springs and drainage area within the State of New York? *A.* Yes.

By Mr. WILLIAMS:

Q. Mr. Birdsall, how much was paid by the City of
168 New York to these various people, Birdsall, Tingue & Co. for whatever rights they possessed in the water of the West Branch of the Byram river?

Objected to as too remote and incompetent and improper.

A. I would have to have a copy of the papers to get the exact wording of them; we got so many things in together, I don't know what it was.

Q. Mr. Birdsall, in this affidavit, which has been referred to before, which you made, you say, "In the case of all these existing dams, mills and factories,

the owners have settled with the City of New York for damages sustained by them by reason of the said proposed diversion, and the City has paid to them large sums of money as damages for interference with the natural flow of the said stream, to wit, upwards of $300,000"; is that statement in your affidavit correct? *A.* That is, including this pond reservoir. 169

Complainants' counsel asks to have marked, for identification, the blue tracing map of the Byram river and lands bordering on same in the State of Connecticut, annexed to the transcript of record in this case in the United States Circuit Court of Appeals, on appeal from the Circuit Court of the United States for the Southern District of New York. 170

Same marked "Complainants' Ex. 2 for Identification, May 5/99."

Complainants' counsel offers same in evidence.

Same objection as before.

EDWIN A. KNAPP, being duly sworn and examined as a witness for the complainants, testifies:

Direct examination:

By Mr. MARSHALL:

Q. Where do you live? *A.* Greenwich, Conn.

Q. How long have you lived there? *A.* The greater portion of my life. 171

Q. What county is Greenwich in? *A.* Fairfield.

Q. How near are you to Portchester? *A.* Three miles.

Q. How far from the Byram river, or the land owned by Mr. Pine and Mr. Muller, plaintiffs in this case; about? *A.* Well, I should say about three and one-half miles perhaps.

Q. What is your business? *A.* Real estate.

Q. Where is your office? *A.* Portchester.

Q. How long have you been engaged in the real estate business there? *A.* About four years.

172 *Q.* What was your business prior to that time? *A.* Retail dry goods.

Q. Whereabouts? *A.* Ten years in Greenwich and ten years in Portchester.

Q. How long have you been acquainted with the valley of the Byram river? *A.* All my life.

Q. Were you born in it? *A.* I was born on the Eastern Branch.

Q. How long did you live on the Eastern Branch? *A.* Twenty years.

Q. Did you own any land on the Eastern Branch? *A.* Well, my father's farm, on which I was raised, was located there.

Q. And owned by your father? *A.* Yes, sir.

173 *Q.* What is the relative or comparative size of the East Branch of the Byram river and its West Branch, just above the junction of the two? *A.* There is not very much difference, as far as I can judge from observation; of course, I never measured the flow of water.

Q. Now, I want you to tell us how low—give us some idea of how low you have seen the current of this river just above the junction in times of drought; I refer to both branches?

Objected to as incompetent, immaterial and irrelevant, and on the further ground that the City does not interfere with the East Branch of the Byram, and has the right to divert, so far as the plaintiffs are concerned,

174 the main waters of the Byram by deed and by statute of limitations.

A. I would say, by way of explanation——

Mr. Dykman—Please answer the question; don't explain.

The Witness—So far as the Eastern Branch is concerned I have seen it almost entirely dry, just a little water percolating through the bed.

Q. At what point? *A.* Well, at a point say th miles above the junction; I have always notic

little more water flowing through the Western Branch 175
at times of extreme drought.

Q. Now, give us an idea comparatively or relatively of how nearly dry or low down you have seen the current of the West Branch somewhere just above the junction; you can fix your own point? *A.* Well, I suppose the flow as I saw it there would fill at the driest time a six-inch water-main, perhaps; from four to six inches.

Q. Now, when did you see it in that condition? *A.* During the summer months; July and August, perhaps.

Q. How often; how many summers? *A.* Well, during the period of my younger manhood, while I was living in that country, I noticed it particularly.

Q. Every summer? *A.* I couldn't swear I have seen 176
it every summer; I have seen it at intervals.

Q. Have you seen it at times of extreme drought? *A.* Yes.

Q. And how low is it then? *A.* Well, about as low as I have already stated; probably fill from a four to a six-inch main.

Q. Have you also examined or seen during the summer months the Byram river below the junction of the East and West branches? *A.* Yes, sir.

Q. Can you give us an idea of what you have seen there of the current in the summer time? *A.* Yes, sir; I would say the bed of the river would be not far from twenty-five feet wide, and at such a time as you have described of extreme drought, there would be water 177
perhaps covering the whole of this surface, but just enough to cover it, but not with any considerable depth to it.

Q. Now, give us an idea of the current or stream of the main Byram river below the junction in the spring or fall? *A.* Well, of course, I never have measured the width of the bed, but I should take it to be about twenty-five feet wide at that point, and on an average not far from two feet deep; that would be my judgment.

Q. Have you examined the beds of the East or West

178 Branch, and the bed of the main stream this spring; have you passed them; been up there? *A.* I don't know that I have been there this spring; I was there in the fall; I was there last fall; I hadn't any occasion to pass up there this spring.

Q. You have followed your business of real estate agent or broker for four years in this vicinity? *A.* Yes.

Q. During that time you have bought and sold and acted in the purchase and sale of real estate? *A.* Yes.

Q. And in obtaining mortgages upon real estate? *A.* Yes, sir.

Q. Are you acquainted with the values of real estate in the neighborhood of the Byram river and in the
179 neighborhood of the lands of Muller and Pine, plaintiffs in this suit? *A.* Yes, sir.

Q. Are you acquainted with the assessed valuation of property in that vicinity? *A.* Yes, sir; familiar with that.

Q. What is about the value given by the assessors to assessed valuations there for the purposes of taxation, as compared with the fair and reasonable value at which property ordinarily sells?

Objected to as incompetent, improper and immaterial.

Q. Are you able to state, and do you know about how the assessed value compares with the fair and reasonable value of real estate?
180

Objected to as incompetent, improper and immaterial.

A. From fifty to sixty per cent.

Q. Have you examined the books of assessment in the town? *A.* I have.

Q. As to the value of Mr. Pine's farm? *A.* Yes, sir.

Q. And what have you found to be the assessed valuation? 181

Objected to, that the books are the best evidence.

A. $8,000.

Q. And what did you find to be the assessed valuation of Mr. Muller's farm there?

Same objection.

A. Assessed for $2,500.

Q. Now, Mr. Knapp, have you gone over Mr. Pine's farm? *A.* I have.

Q. Examined it? *A.* Yes, sir.

Q. Now, what in your opinion is the fair and reasonable value of Mr. Pine's farm? 182

Objected to.

A. $15,000.

Preliminary cross-examination:

By Mr. DYKMAN:

Q. What property have you bought or sold within four years there, in this neighborhood, as an agent? *A.* Well, while I ——

Q. Please name me one place that you have bought or sold? *A.* In this immediate vicinity; would you regard anything within the Town of Greenwich?

Q. I ask you that question, what property have you bought or sold yourself as agent? *A.* I bought a property on the Bellhaven shore road; about four miles from this property. 188

Q. You term within four miles this immediate neighhood, do you; I meant farm property, not a place on the Bellhaven shore road? *A.* None in that immediate vicinity.

Q. What is the nearest place that you bought as an agent? *A.* In Portchester.

Q. In the Village? *A.* Yes, sir.

Q. Village property? *A.* Yes, sir.

Q. Name me the last farm you have bought or sold

184 yourself either as principal or agent? *A.* We haven't dealt in any farm property.

Q. I am asking what you have bought or sold? *A.* Haven't bought or sold any farm; not in the last four years.

Q. Last five? *A.* No, sir.

Q. Last ten? *A.* Not in that vicinity; no, sir.

Q. How far from this; a farm? *A.* We haven't bought or sold farm property.

Q. Within what distance of the property in question have you bought or sold a farm either as principal or agent within ten years? *A.* Well, I have explained to you——

Q. I beg your pardon; will you please tell us within
185 what distance you have bought or sold a farm—— *A.* Personally I haven't bought or sold any.

Q. Either as principal or agent? *A.* No, sir.

Q. How many places have you sold in the last year? *A.* You refer to——

Q. Numerically speaking, all your real estate transactions, no matter where they are? *A.* I don't know; but two or three quite valuable places in Portchester.

Q. I am not speaking of the value; numerically speaking, how many? *A.* Well, the firm I belong to——

Q. What firm do you belong to? *A.* The firm of Knapp & Wakefield sold two places on Westchester avenue in the Village of Portchester.

186 *Q.* In the last year; how far from the railroad depot? *A.* Well, about two or three blocks.

Q. Country seats; villa sites, were they not? *A.* No; village property.

Q. Now, come to the question of farm property; what farm have you ever sold, as an agent or principal? *A.* We have not dealt in that property.

Q. No farm property? *A.* Not as an agent or principal; no, sir.

Mr. DYKMAN—I object that the witness is not compe- 187
tent to answer this question, on the ground that he has never bought or sold any farm property either as principal or agent; he has only been in business four years.

By Mr. MARSHALL:

Q. Taking a point from the south line of Mr. Pine's land northward up the Byram river and its branches to the State line, what farms have been sold within the last four years?

Objected to, unless the witness has personal knowledge, not what he has read or what he has heard; and defend-
ant's counsel reserves right to cross-examine witness as to 188
his personal knowledge; question withdrawn.

Q. Do you know of any farms that have been sold from the south line of Mr. Pine's farm, plaintiff in this suit, northward along the Byram river and its two branches, to the State line, within the last four years? *A.* Yes, I know of such having been sold.

Q. What do you know about that? *A.* Information that I had from the attorneys who negotiated the papers.

Q. How many such sales have come to your knowledge? *A.* Very few; very few transactions have been made there within the last four years.

Q. Can you tell us about how many that you have known about?
189

Objected to.

Q. How many farms do you know of having been sold in that locality that I have described?

Objected to, that the witness has stated that his entire knowledge consists of information received from others.

190 *Q.* What farms do you know by common report of having been sold?

Objected to on the ground that the plaintiff has no right to prove sales by common report, the testimony being hearsay.

A. Property sold by Peter Schreibweiss to C. B. Collins September 18, 1895; that is one sale that has been made within that period of time.

Q. How many sales do you know of by common report that have been made in this locality I have described in the last four years? *A.* Only two.

Q. Do you, as a real estate agent and broker in that vicinity, keep track of sales by inquiry? *A.* I endeavor
191 to do so; yes.

Q. Do you know anything about the prices paid on these two sales? And I ask you do you know of your own knowledge, not what some one has told you? *A.* No, sir.

Q. You testified to the value of Mr. Pine's farm, in your opinion, to be what? *A.* Fifteen thousand dollars.

Q. Last year you spoke of having sold some two or three parcels of real estate; did you act in renting others? *A.* Yes, sir.

Q. Can you give us any idea how many parcels of real estate in that general neighborhood of Portchester and the Byram river you acted in renting?

192 Objected to, unless it calls for similar property, not village property.

A. Of course, I haven't an exact record, but thirty or forty pieces.

Q. What value do you place on the average on farm land along the Byram river and in the vicinity of Portchester?

Objected to as incompetent, immaterial and improper.

A. All the way from $100 to $150 per acre.

Q. Can you give us a general idea of the character

of Mr. Pine's and Mr. Muller's property there and the 193
surrounding neighborhood, its uses? *A.* Well, Mr. Muller's place is used entirely for farming purposes, and Mr. Pine's is used in part for farming and also in part for getting out and manufacturing feldspar.

Q. And the property in the neighborhood of those farms – give us some idea of its character, as to whether it is all farming property or residential property, or what?

Same objection, as incompetent and improper.

A. Mainly farming property.

Q. All farming property? *A.* No, sir; not all, because there are manufacturing interests there, which, 194
of course, have houses where the operatives live.

Q. Is any of it used for residential, as distinguished from farming purposes, or exclusively residential purposes? *A.* There are a few such places; yes, sir.

Q. Well, give us their proximity to the Pine or Muller places? *A.* Well, we will say within a radius of a mile and a half from there; on King street, quite a number of very valuable places.

Q. In reaching your estimate of the value of Mr. Pine's farm, what have you allowed for the feldspar deposit, assuming that a feldspar deposit exists on that farm? *A.* Made no allowance for it.

Q. Have you included the improvements on that farm in your estimate of its value? *A.* Only the 195
farm, barns and house that is there.

Q. Is there a mill there for manufacturing feldspar? *A.* Yes, sir.

Q. Have you included that in this valuation of $15,000? *A.* No, sir.

Q. Then is it true that your value of $15,000 is exclusive of the feldspar deposit and the feldspar mill? *A.* Yes, sir.

Q. Now, Mr. Knapp, assuming that along the line of

196 Mr. Pine's land the flow of the Byram river is decreased by the construction and use of the dam at the State line by the City of New York by one-quarter or one-third, does the depreciation of Mr. Pine's property in your opinion amount to more than $2,000?

Objected to as incompetent, immaterial and improper, not the best method of arriving at the difference in the market value of the property in question.

A. Yes, sir.

Q. Have you lived all your life in the vicinity of this Byram river? *A.* Well, with the exception of perhaps eight or ten years.

197 *Q.* What part of your life was that? *A.* Well, a period of twenty-five years ago, when I was living in New York City.

Q. You lived, then, away from it in the City of New York for eight or ten years? *A.* About eight years; yes.

Q. Now, you were raised on the East Branch of the Byram river? *A.* Yes; on my father's farm.

Q. And you stayed there until you were what age? *A.* Until I was twenty.

Q. Now, won't you give us the rest of your residence, right down? *A.* I was then in the employ of H. B. Claflin & Co., here in this city.

Q. About what age? *A.* At about twenty-five or
198 six years of age; previous to that time I was with Lord & Taylor.

Q. Does that all make up the eight years that you were away? *A.* Yes, sir; and with various other companies here in New York.

Q. Did the total of your absence make up more than eight years? *A.* No, sir.

Q. Then where did you go? *A.* I went in business for myself in Greenwich, Conn., and I was there ten years in the retail dry goods business; there are two years of my life that I was in the State of Minnesota, at Winona; I stayed there between two and three

years in the drygoods business, and then removed to 199
Portchester, where I have been ever since; that is about twelve or fifteen years ago.

Q. What business did you take up in Portchester then? *A.* I was there ten years in the drygoods business again, and then I sold out my drygoods business and took up real estate.

Q. And in that you have continued since? *A.* Yes.

Q. And are now engaged? *A.* Yes, sir.

Cross-examined (by Defendant's Counsel):

By Mr. DYKMAN:

Q. You were asked a few moments ago what sales 200
you knew of by common report; you were reading from a memorandum book, and asked the plaintiff's attorney if he desired to know the libers and pages of the transfers. Those were copies, were they not, from the Greenwich Town Clerk's office? *A.* Yes, sir.

Q. Why did you make those copies if you knew of them before you went there? *A.* Because I supposed they would be authoritative, and I could answer the question——

Q. Didn't you know of them before you went there? *A.* I knew of the transfer, but I couldn't get at the price because ——

Q. What knowledge had you of the price other than what you read after you reached Greenwich? *A.* 201
From consultation with the attorney in the transaction?

Q. And you copied those records? *A.* Yes, sir.

Q. Now, you spoke of King street—of some handsome places on King street—how far is King street from the property in question where these handsome places are? *A.* Well, I should suppose a mile and a half or a mile—half a mile, some of them. Anywhere from half a mile to a mile and a half; all along there, for several miles along King street.

202 *Q.* You did not consider the mill on the property in question? *A.* No, sir.

Q. Or the feldspar? *A.* No, sir.

Q. You did testify, however, that there would be a reduction, did you not, if one-quarter or one-half of the water was taken away; have you so testified? *A.* Reduction on what?

Q. Reduction in the value of the property? *A.* Oh, yes; I thought it would be affected by the taking of the water.

Q. To what extent? *A.* Well, the figures I have on it are about thirty per cent. of the value of the property.

Q. Thirty per cent? *A.* Yes.

203 *Q.* How did you arrive at thirty—why wasn't it fifty or why wasn't it ten? *A.* For the reason that if I were going to buy the property as a place of residence, or if I were going to attempt to sell it, I should consider that in a time of drought that the place would be deteriorated to that extent; that is my judgment.

Q. Assuming that prior to the City of New York taking any action in this matter, Russell, Birdsall & Ward, Tingue, House & Co., and other owners of water rights, had purchased land at the head waters of the stream, had built a dam, had operated that dam and detained the flow for over sixteen years, their action in depriving this farm of water would be equally as detrimental, would it not, as the action of the City?

204

Objected to upon the ground that the question assumes facts that have not been proven, and that it assumes a fact which is directly the reverse of what has been proven, to wit, that these people never did divert the water from the channel of the Byram river, but that after they used the water—if they used the same—it continued to flow down the channel of the Byram river.

A. I shouldn't regard the action of these gentlemen 205
referred to in damming up the Byram Pond as being injurious to Mr. Pine's property, for the reason that they maintained the flow of water there at the very time of the year when the river bed is normally the driest, and it would be rather a benefit than a damage.

Q. Then they benefited the property? *A.* They didn't injure it any.

Q. Did they benefit it? *A.* I couldn't testify that it would be a positive benefit to it.

Q. Was it a benefit or a damage to its market value? *A.* Well, my judgment is, it was no damage to the property.

Q. It was not a damage to the market value of the property? *A.* No, sir. 206

Q. That you are sure about? *A.* Yes, sir.

Q. Were you in the real estate business when they built the dam? *A.* No, sir.

Q. You have never bought or sold a farm in the neighborhood in your life, have you? *A.* No, sir.

Q. Don't own any? *A.* No farm.

Q. What is the nearest farm to this property that you own? *A.* Well, I had an interest in my father's farm, but I didn't own it, of course.

Q. You never bought or sold any farm? *A.* No, sir.

Q. You have never had occasion to sell a farm from which one-quarter or one-half of a stream was diverted, have you? *A.* No, sir.

Q. One-quarter of the waters of Byram river and 207
Byram Pond would supply all the cattle on this property with water, would it not? *A.* In ordinary seasons of the year it would.

Q. As a rule? *A.* As a rule.

Q. Is there any mill-pond on this property? *A.* No pond; no, sir.

Q. How many acres are there in this place? *A.* 106.

Q. How many feet frontage on the river? *A.* It is 3,725 feet.

208 *Q.* Both sides? *A.* That takes both sides; I understand—no, not both sides, because Mr. Williams has an interest on the other side; so it is all on one side.

Q. So that the plaintiff Pine in this action only owns one side of the stream? *A.* Yes.

Q. How was the market value of his property decreased, if there is water enough left for cattle, assuming he has no right to build his dam across the stream or hold the water for a moment, the plaintiff Pine owning the land on one side of the river only? *A.* Will you allow me to answer that question in my own way?

The COMMISSIONER—Answer the question as you
209 think it should be answered.

Question repeated.

A. I have already stated that the flow of the eastern branch is nearly as large, in my judgment, as the flow of the western branch; Mr. Pine, in the event of the eastern branch being taken, would be almost absolutely destitute of water there, in my judgment, in a very dry time.

Q. Now, then, assume that the City of New York has not taken the waters of the East Branch, and has not interfered with them, and has only taken or intends to take the head waters of the Byram to the extent that Mr. Marshall said, of a quarter or a half, and there is still water enough there for cattle, how do you ac-
210 count for the difference in the property; leave the East Branch out entirely? *A.* During the extremely dry periods the stream will be so diminished there that to a certain extent it would be, or perhaps might become, a menace to the public health; it might injure the immediate surroundings of the place.

Q. And it might not; is that correct? *A.* Yes; there is a possibility there.

Q. Now, we have the element of the public health; what other elements have you; leave the East Branch out entirely? *A.* Well, if you diminish the flow of a stream of water in front of a man's place,

where the stream is the feature of the place, as is the case of Mr. Pine's, he having over 3,000 feet frontage, you certainly damage the property in my judgment. 211

Q. In what way? *A.* Well, you detract from its attractiveness.

Q. If there is water enough to water cattle? *A.* Well, that isn't the main consideration.

Q. How far is Mr. Pine's residence from the brook? *A.* I suppose 100 feet.

Q. How wide is the river? *A.* About 25 feet at that point.

Q. That is below the point where the East Branch strikes the Main Branch? *A.* Yes, sir.

Q. How far from the point where the East and the Main Branch of the Byram meet each other is the Pine residence? *A.* I really don't know; I should suppose it is a mile and a half or two miles; I am not positive as to the distance. 212

Q. Now, what actual effect on the market value of the property, other than imaginary, to look at, does this diversion have—what practical effect?

Objected to upon the ground that the witness has answered that question several times.

A. Well, what do you mean by practical?

Q. Practical effect upon the market value, other than the ones you imagine, that one man might want to see a stream. I mean the practical use and occupation of the property, how is it affected? 213

Same objection, that the witness has definitely answered that question several times.

A. As a matter of practical utility, Mr. Pine has water power there; he has a fall of—the map will show what—but sufficient to drive machinery, and that is an element with which I can't deal.

Q. Have you dealt with that element in giving your opinion? *A.* No, sir; not at all.

Q. Now, deal with your own opinion; how does this diversion affect the practical use of the property,

214 as you have considered it? *A.* For farming purposes, you mean?

Q. I mean for any purpose you have taken into consideration? *A.* Well, it affects this in this way that it reduces the water supply of the place.

Q. Outside of the mill, which you did not consider, how would that practical use affect it, if there is water enough there for cattle? *A.* Well, for farming purposes, anything that would detract from the flow of water on a place is always liable to cause a deterioration in the value of the property.

Q. What do you use the water for there outside of the mill, which you haven't considered? *A.* Well, it is used for domestic purposes partially.

215 *Q.* And if there is enough there for that domestic use? *A.* Well, that is one of the points I am not clear on.

Q. Assuming the statement made by the plaintiff's attorney to be true, that it is decreased in flow from one-half to three-quarters, there would be still water enough there for cattle to drink? *A.* I suppose that might be so.

Q. Aren't you sure it is so? *A.* I wouldn't be positive of it, if the Eastern Branch were taken away.

Q. Assuming that the Eastern Branch is not taken away in this litigation, you think there would be enough? *A.* The Eastern Branch would provide enough; yes, sir.

216 *Q.* Then assuming that the City of New York in no way up to present time has interfered with the Eastern Branch, there would be enough water there for ordinary domestic and household uses? *A.* From that source, yes, sir.

Q. No matter from what source, there would still be water enough there? *A.* Yes, sir.

Q. Then we now have the place supplied with sufficient amount of water for ordinary household and domestic use, assuming that the city does not

take the Eastern Branch. What other element of damage enters into it, in your consideration? 217

Objected to, that the witness has already answered it several times.

A. There is no other element of damage except the diminished water; there is no element of damage there that I have to do with except the diminished flow of water.

Q. That diminished flow of water relates to what, other than the ordinary household and domestic use? *A.* So far as any consideration I have entertained of it, it has no other application.

Re-direct (by Complainant's Counsel): 218

By Mr. MARSHALL:

Q. You were present this afternoon when Mr. Birdsall testified that the diminished flow there could be as much as about 8,000,000 gallons per day, were you not? *A.* Yes, sir.

Q. Now, when I asked whether the damage to Mr. Pine's farm is more than $2,000, by reason of this diversion, and you tell me it is, do you mean that in the diminished flow of water flowing down the channel of the Byram river there is a loss of more than $2,000 to that farm?

Objected to on the ground that it is putting the witness in the place of the Court, and on the further ground that the witness has already answered the question. 219

A. Yes, sir; I do.

Q. What do you mean by the damage done to Mr. Pine's farm? *A.* I mean the decrease in the flow of the water in time of drought—or during the whole year for that matter.

Q. The decrease in the flow of water? *A.* The damage that would come to Mr. Pine's property comes through the diminished flow of the stream.

Q. When Mr. Dykman asked you the distance of Mr.

220 Pine's house from the "brook" did you understand him by the brook to mean the river? *A.* Yes, sir.

Q. In your opinion a piece of land like Mr. Pine's, with a natural flow along it of 24,000,000 gallons a day, is more valuable than if the flow were reduced 50 per cent., 33⅓ per cent. or 25 per cent.? *A.* Yes, sir.

Q. You regard a large flow of water as more valuable than a small flow? *A.* Yes, sir.

Re-cross:

By DEFENDANT'S COUNSEL:

Q. Will you please tell me why a piece of property
221 is worth more with this river, we will assume, five feet deep than five feet and an inch deep; what is the practical difference; you have already said if there was water enough there for ordinary household and domestic use there would be no difference in the market value of the property; you have eliminated the value of the water power?

Objected to upon the ground that it is a double-headed question, and that it assumes facts not proven to exist, and which couldn't by any means exist, a difference of one inch on a flow of five feet, and therefore incompetent, irrelevant and immaterial.

A. On the same principle that I would regard a large
222 full flowing stream through my property of infinitely more value than I would an open ditch.

Q. If there was water enough to satisfy all ordinary household and domestic uses, and there was no mill upon the property, how could a slight difference in the quantity of water affect the value of the property?

Objected to upon the ground that a fact is assumed that has not been proven, and which is directly the reverse of what has been proven, that the decrease is 33⅓ per cent.

A. If the statement of the Chief Engineer—— 223

Mr. DYKMAN—I want an answer to my question.

Q. (Repeated.) *A.* I do not regard the difference as slight.

Q. Assume it to be one-third, and still that there is water enough for all ordinary household and domestic uses, how could it affect the market value of the property? *A.* For the reason I have already stated, that the river is the feature of Mr. Pine's property, preeminently so, and when you have once destroyed that feature of his property you have affected the value of that property very materially.

Q. Have you ever seen it destroyed; ever seen it dry? *A.* No; I have not. 224

Q. Are you interested in any property on the Byram river?

Objected to as already answered.

A. No; I have no interest there, not directly, on the Byram river.

Q. Indirectly? *A.* No, sir; I own a brick block in Portchester, but that isn't on the Byram river; Portchester is on the river, but my property isn't.

EDWIN A. KNAPP.

Subscribed before me }
March 20, 1900. }

225

JAMES A. RENWICK,
U. S. Examiner.

Adjourned to Friday, May 12, 1899, at 10 A. M.

226

SAMUEL PINE and another

against

THE MAYOR, ETC., OF NEW YORK.

NEW YORK, May 12, 1899.

Met pursuant to adjournment.

Present—The Commissioner, Mr. WILLIAMS.

A telegram is received from Mr. Dykman stating
227 that he is unable to be present.

Further hearing adjourned until further notice.

NEW YORK, June 28, 1899.

Met pursuant to notice.

Present—The Commissioner, Mr. WILLIAMS.

On account of the absence of the witness, the hear-
228 ing is adjourned until the forenoon, at 1.30 P. M. of this date.

JUNE 28, 1899, 1 P. M.

The witnesses being unable to attend, the hearing is adjourned until July 12, 1899, at 10.30 A. M.

NEW YORK, July 12, 1899. 229

Further testimony for complainants, taken before JAMES A. RENWICK, Esq., Examiner.

Appearances—Mr. WILLIAMS, for complainants (Mr. MARSHALL, of counsel); Mr. HENRY T. DYKMAN, for defendants.

DANIEL M. GRIFFIN, being duly sworn and examined as a witness for the complainants, testifies:

Direct examination:

By Mr. MARSHALL:

Q. Where do you live? *A.* Portchester, New York. 230

Q. Do you own property on the West Branch of the Byram river? *A.* Yes, sir.

Q. Will you state its general locality? Describe the locality of your property.

Objected to as incompetent, what he owns, and immaterial and improper, and on the further ground that the property owned by the witness is not the subject of this litigation and has no reference to it.

Q. Describe the locality of your property in reference to the dam built by the City of New York, and in reference to the junction of the East and West Branches of the Byram river. 231

Same objection, and on the further ground that the locality of the property owned by the witness can have no effect upon the Pine property.

A. It is on the State line; I don't know how I can describe it better than that.

Q. Describe the location of your property in reference to it, how far from the city dam? *A.* I never measured it.

232 *Q.* About how far?

Same objection.

A. Two hundred yards perhaps.

Q. Now, how far are you from the junction of the East and West Branches of the Byram river?

Same objection, as immaterial.

A. I should say in the neighborhood of four and one-half to five miles.

Q. How large is your ownership there, in acres?

Objected to as incompetent, improper and immaterial.

A. Two hundred and ninety (290) acres.

233 *Q.* Explain how that farm lies along the West Branch of the Byram river; is it all on one side?

Mr. DYKMAN—It is not material. I will admit now that he owns some property on the Byram river, if he says he does. I know his father did.

A. No.

Q. How does it lie? *A.* They strike together on corners, as I might say; one is on one side and the other on the other, and the corners meet.

Same objection.

Q. You are speaking of two farms? *A.* Yes, two farms, and the river separates them both.

Q. How far are these farms from the land of Mr.
234 Pine, the plaintiff in this action, the Pine farm? *A.* If you mean the same Pine you spoke of, four and one-half or five miles.

Q. And how far from the land of Frederick Muller? *A.* I don't know where Muller's land is.

Q. Your land doesn't lie on the East Branch nor touch the East Branch of the Byram river? *A.* No, sir.

Q. Dr. Griffin, will you give us a statement as to how many years you have lived on this property of yours, on the West Branch of the Byram river?

Same general objection, as incompetent, improper and immaterial.

A. Until I was twenty-one. 235

Q. Were you born there? *A.* Yes.

Q. And you have lived near there, in that section, since you were twenty-one? *A.* No.

Q. Where have you lived? *A.* On the Harlem Railroad, Pleasantville; since then, in Portchester.

Q. Have you been in the habit of visiting this property; your property on the Byram river?

Objected to on the ground that the property owned by the witness, or claimed to be owned by him, is not the subject of this litigation.

A. Yes.

Q. How frequent? *A.* Sometimes once a year, and some years every month. 236

Q. Now can you describe to us how, prior to the construction of the dam by the City of New York, you found the flow of water in the West Branch of the Byram river? *A.* There was a running stream.

Q. Do you know whether the character of that stream has been changed—whether the character of its flow, as to the water, has changed since the construction of the dam by the City of New York; I ask you whether you know?

Objected to on the ground that the point in the river is not fixed, the property in question being immediately below the East Branch of the Byram river.

A. Yes. 237

Q. Have you visited those farms since the construction of the dam by the City of New York? *A.* I did.

Q. And you have examined the channel of the river through your property since the construction of the dam by the City of New York? *A.* I did.

Q. Now, will you state when you examined it? *A.* Middle of last August.

Q. And state what you found? *A.* Dry stream; no stream.

Same objection.

238 *Q.* Have you ever found that stream dry prior to the construction of the dam by the City of New York.

Same objection, and the further objection on the ground that the witness is now relating a state of affairs as existing on property five miles above the property in question and above the East Branch of the Byram river, the property referred to by the witness not being the subject of this litigation.

A. No.

Q. Dr. Griffin, do you know of a swamp in or about this city dam, the Tamarack swamp? *A.* The Tamarack swamp is nowheres near the dam.

239 *Q.* Do you know of a swamp in or about the dam? *A.* Yes.

Q. Is the pond constructed in a swamp or not? *A.* Yes.

Q. Is it dug out of the swamp? *A.* Yes.

Cross-examined by Mr. DYKMAN:

Q. Do you know of a river called the East Branch of the Byram river? *A.* I know of it, yes.

Q. Do you know where the Pine property is? *A.* Yes.

Q. Tell me where it is, please; who bounds it on the north and on the south? *A.* I couldn't; I am not
240 familiar enough with it.

Q. You are not sufficiently familiar with the property which is the subject of this litigation to tell who adjoins it on the north or on the south? *A.* I couldn't; I drive by it once in a while but I am not familiar with the neighborhood.

Q. How long is it since you have seen it? *A.* I haven't been by that property in at least a month.

Q. When you were by it, did you drive there? *A.* *A.* Yes.

Q. Could you see all the Byram river through the

Pine property, when you were driving by? *A.* Why, 241
yes; if I looked, I suppose.

Q. Did you look? *A.* I didn't pay any attention; no, sir.

Q. Now, tell me the last time that you paid any attention to the Byram river running through the Pine property? *A.* I never paid any attention to it at all down there.

Q. Now, the property that you speak of, where there was no live stream, was the property owned by Daniel M. Griffin years ago? *A.* Yes.

Q. About the State line? *A.* Yes, sir.

Q. And below the point to which you have made reference there are streams running into the Byram river, are there not? *A.* None that I know of, until 242
you strike the other branch of the river.

Q. The general drainage area of the entire country flows in, does it not? *A.* Well, yes; I presume it does.

Q. Do you presume so, or do you know? *A.* It must necessarily.

Q. Do you own what we commonly term the Daniel M. Griffin farm? *A.* Yes.

Q. And you are a claimant against the City, are you not, for damages caused by the diversion of those waters? *A.* Yes, sir.

Q. And as such claimant, you, of course, have studied this situation?

Mr. MARSHALL—What situation? 243

Q. The situation of commencing actions against the City or presenting claims against them for damages? *A.* I want damages for taking all the water I have got.

Q. And you have consulted with the counsel in relation to those claims, have you not? *A.* I don't know what you would call a consultation.

Q. Talking to a lawyer, to be more explicit? *A.* Well, the lawyer talked to me.

Q. Will you please answer my question; have

244 you or have you not talked to a lawyer in relation——
A. Yes, I have talked to a lawyer with relation to it.

Q. In relation to these claims—this claim that you have or claim to have against the City, is that correct? *A.* Yes, sir.

Q. Who was that attorney? *A.* Mr. Williams has the contracts.

Q. Mr. Williams, the attorney for the plaintiffs in this action, has a contract with you in relation to your claim against the City for damages to what I term the Daniel M. Griffin farm on the Byram river, is that correct? *A.* He was to collect for a certain percentage.

Q. I am not asking you that; I say, he has a contract with you to collect damages against the City, is that
245 correct? *A.* Yes, sir.

Q. Damages which you claim the City has caused your farm by diverting these waters? *A.* Yes.

Q. Do you remember the construction of the dam by Tingue, House & Co., Reynolds & Russell, Birdsall & Ward? *A.* I remember hearing of it, that is all.

Q. How old are you, please? *A.* Thirty-two, nearly thirty-three.

Q. You have stated that the stream below the reservoir was dry; in making that statement you refer, do you not, to the stream running through the Daniel M. Griffin property? *A.* Yes, sir.

Q. You don't say it was dry in running through the Pine property? *A.* I don't know anything about that.

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Re-direct (by Counsel for Complainants):

By Mr. MARSHALL:

Q. Have you any agreement at present with Mr. Williams? *A.* Not since the 1st day of July; my mother hasn't been here to sign the papers.

Q. There is no contract then at present between you and Mr. Williams or any other counsel in this action? *A.* Not at the present time.

Re-cross: 247

By Mr. DYKMAN:

Q. You say you have no agreement, either verbal or in writing, with any attorney in the world in relation to your claim against the City? *A.* At the present time, no, sir.

Q. Never signed any papers? *A.* No, sir.

Q. Never had any conversation with any attorney wherein you stated the amount you would give him, or any percentage? *A.* No, sir; not since the expiration of that date.

Q. I beg your pardon; I mean any time during your life? 248

Objected to.

A. Yes, I did, which expired the first day of July, with Mr. Williams.

Q. How long did that agreement continue in force which expired the first day of July? *A.* I think for two or three months; I forget the first.

Q. It was in force two or three month? *A.* Yes, sir.

Q. Is it not the fact that since that time that it has been a general understanding with you and the people owning the property that the agreement would be renewed, or that a new agreement would be made?

Complainants' counsel object to this entire line of examination as incompetent, irrelevant and immaterial; the witness has testified there is no contract or agreement of any kind in existence between him and any of the counsel in this action. He is now asked whether there is a general understanding. It is simply a reiteration of the same question, and he has answered it. 249

A. Not definitely stated; I don't know that there was.

Q. Please tell me what took place between you and

250 your attorney after the expiration of the agreement to which you have referred?

Objected to as immaterial, irrelevant and incompetent, and upon the further ground that the witness is not obliged to state what passes between himself and counsel. Complainant's counsel advises the witness to refuse to answer that question.

Q. Do you decline to answer, Dr. Griffin? *A.* I am advised not to; I decline to answer.

Q. Do you decline to answer this question on the ground that it will tend to incriminate you in any way? *A.* No.

251 *Q.* Have you filed a claim against the City of New York for your damages to your property? *A.* I believe Mr. Williams did.

Q. You believe he did; when was that done, or about when? *A.* I can't remember the date.

Q. Do you remember the year? *A.* It was last year, I think.

Q. In 1898? *A.* I believe it was, if I am not mistaken.

Q. And at the time of the filing of that claim you had an agreement with Mr. Williams as your attorney in relation to the recovery, did you not? *A.* Yes, sir.

Q. Was that agreement in writing or a verbal agreement? *A.* The agreement was in writing.

252 *Q.* Where is that agreement? *A.* I possess one copy at my house.

Q. Can you tell me from memory when that agreement expired? *A.* No, I cannot.

Q. Can you approximate the date? *A.* It was extended; I cannot remember really.

Q. Can you approximate it within six months? *A.* September or October.

Q. After the expiration of the agreement which as you approximate it, was September or October, 1898,

did you take any further steps toward protecting your 253
claim? *A.* The agreement was renewed.

Q. Verbally or in writing? *A.* In writing.

Q. And when did the renewal expire, if at all? *A.* I can't give you the date of that; there was a renewal made which expired the first day of July, 1895.

Q. And was the renewal expiring in July, 1899, renewed? *A.* Not yet.

Q. Verbally or in writing? *A.* Neither way.

Q. And that agreement related to the claim of the owners of the property in question, known as the Griffin property for damages against the City, caused by the diversion of the water of the Byram river? *A.* Yes, sir; that is right, caused by the diversion of 254
the waters.

Q. Did you know, or do you know, the construction of the dam at Byram Pond by Russell, Birdsall & Ward, Tingue, House & Co., Reynolds and others? *A.* I have heard of it; as I say, I was too young then to take much interest in it.

Q. As you grew older, did you not see the dam at Byram Pond? *A.* I don't know that I ever saw it, ever noticed it; you are not speaking of the reservoir there?

Q. I am speaking of the dam built by Russell, Birdsall & Ward, Tingue, House & Co., and Reynolds and others, at the foot of Byram Pond prior to the City of New York taking any action whatsoever? *A.* I don't know that I have seen the dam; I may never have 255
seen it.

Q. Take your own farm, Mr. Griffin, the waters of the Byram river flowed through it prior as you say to the construction by the City of New York of this reservoir in the swamp? *A.* Flowed through it, yes, sir.

Q. Nothing flows now, except any surplus water that may go over it? *A.* Last time I saw it it didn't.

Q. As a general principle, nothing flows over the dam

256 now, except the surplus water? *A.* There was no surplus there, except in the wet season.

Q. I mean as a general rule? *A.* I haven't seen the dam lately; I can't answer the question as to the present time.

Q How often have you seen it? *A.* I have never been up there but once, and then I went all around it.

Q. Was the water backed back then? *A.* It was running through your reservoir, but not over the dam, positively not.

By Mr. MARSHALL:

Q. I understood you to say, did you not, that there
257 is no contract now between yourself and any attorney in respect to your claim against the City of New York? *A.* At present none; no, sir.

By Mr. DYKMAN:

Q. This contract expired July of this year? *A.* Yes, sir.

Q. When were you first asked to appear here as a witness in the Pine case? *A.* I could tell you that by looking up my letters; I don't remember the exact date.

Q. Three or four weeks ago? *A.* It must have been.

Q. Your contract hadn't expired then? *A.* Probably
258 not when I first got the notice to come here.

Q. And at the time when you were first advised that you would be wanted here as a witness in this Pine case? *A.* I don't think it was.

Q. Were you subpœnaed, and your fees regularly paid? *A.* No, sir; I was not subpœnaed.

Q. You came here voluntarily at the request of Mr. Williams, or this firm? *A.* Yes, sir.

Q. At a time when you had a contract with this firm in relation to your claim for damages against the City of New York? *A.* The first request I had was before the contract had expired.

Mr. MARSHALL—The counsel for the complainants in 259
this action desire to have it appear on the record that it was admitted by them that they are now considering and consulting with the witness in respect to his claim against the City of New York.

Mr. DYKMAN—I object to any statement being placed upon the record by the counsel for the complainants.

April 2, 1900.

DANIEL M. GRIFFIN,
By JAMES A. RENWICK,
U. S. Examiner.

LAWRENCE B. JENCKES, being duly sworn and examined 260
as a witness for the complainants, testifies:

By Mr. MARSHALL:

Q. Mr. Jenckes, where do you live? *A.* I live in Stamford, Connecticut.

Q. And what is your present occupation or business? *A.* I am Superintendent of Public Works for the City of Stamford.

Q. What is your profession or business? *A.* Civil engineer.

Q. When did you begin to be a civil engineer? *A.* I graduated from the Sheffield Scientific School, Yale College, in 1887.

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Mr. DYKMAN—I will admit he is a competent civil engineer in good standing.

Q. You hold a degree? *A.* I do not hold the degree of civil engineer; I hold the degree of Bachelor of Science, Ph. B.

Q. Mr. Jenckes, have you visited certain property on the main Byram river, referred to in the complaint in this action of Pine and Muller against the Mayor, etc., of the City of New York, and owned by Mr. Pine? *A.* I visited Mr. Pine's property.

262 *Q.* When? *A.* On the 26th of May, I think it was; I made a little note of it at the time (referring to book), 25th of May.

Q. Did you make any examination of the water rights or privileges of his property in respect to the Byram river? *A.* Yes, sir.

Q. Will you state generally what you found?

Mr. DYKMAN—Objected to unless the witness confines himself to the property lying on one side of the river only, owned by Mr. Pine.

Mr. MARSHALL—We confine the question to Mr. Pine's property, which does lie on one side of the river only.

263 *Q.* I add to the question the statement that it is in evidence that Mr. Pine's property does lie on one side of the Byram river only; that you understand, Mr. Jenckes? *A.* I understand that; yes, sir.

Q. (Repeated) Will you state generally what you found, confining the question to Mr. Pine's property, which lies on one side of the river only? *A.* I found at the lower end alongside of Mr. Pine's land—I found at the lower end of his land, a pond held back by a dam, about 13 feet high, and at the head of that pond the Byram river flows through a rather steep valley, where a dam could be erected——

Mr. DYKMAN—I move to eliminate from the testimony of the witness anything that could be done. We have
264 it admitted that he owns one side of the river. What he found, that is the question.

Mr. MARSHALL—I want to state in behalf of the plaintiffs in this case that they will later connect whatever testimony may be taken on this line by reading in evidence or offering in evidence the general statutes of Connecticut relating to pond rights and the right to dam running streams in the State of Connecticut, as between owners owning opposite each other on a stream. We are not prepared to offer that statute this morning.

A. (Continued) Well, proceeding further up the

stream I found—I would like to ask a question, if I might, if you intended to include anything but the stream in the question that you asked me; just what I found on the stream itself, without regard to any other property of Mr. Pine? 265

Q. What you found on the stream itself, along Mr. Pine's land? *A.* Well, I think that is all I found in regard to the stream.

Q. Above this valley, through which you say the stream flows, you found the stream, I presume? *A.* Yes, sir.

Q. About how wide; what did you find there; what sort of a stream? *A.* A running brook, running quite rapidly, varying in width—the bed of the stream varying in width from five to fifteen feet, I should say. 266

Q. Now, will you state from your examination of that valley, through which the stream runs—will you state as a civil engineer what could be done in respect to the erection of a dam?

Mr. DYKMAN—Objected to on the ground that it is a self-evident proposition that a dam could not be built on one side of a stream, the complaint in this action showing that the plaintiff only owns the land on one side of the stream in question, and that the question must be confined to the lands owned by the plaintiff.

Mr. MARSHALL—In answer to the objection, the plaintiff's counsel states that they are not limiting the question to what the plaintiffs in this action could do, but as to what this civil engineer, as a scientific man, found as a matter of scientific engineering could be done, eliminating the question of ownership? 267

Mr. DYKMAN—Then I object to it on the ground that the question of ownership cannot be eliminated.

A. A dam could be erected at this point with reasonable cost, which would throw the water back to the upper end of Mr. Pine's land.

268 *Q.* At which point do you mean? *A.* At the head of the pond at the lower end of Mr. Pine's land.

Q. Can you state what would be the height of that dam? *A.* About ten feet.

Q. Now, can you, as a civil engineer, state the value of the water-power that could be developed there by the dam, taking into consideration the fact that prior to the erection of the City's dam the flow down the Byram river averaged about 24,000,000 gallons per day?

Objected to.

Mr. DYKMAN—I ask leave to examine the witness as to his competency to testify to the value of any water-power on the Byram river.

269

By Mr. DYKMAN:

Q. What water-power have you bought or sold on the Byram river? *A.* None.

Q. What is the nearest water-power that you have bought or sold, either as an individual or as an agent? *A.* Never bought or sold any.

Q. What is the nearest water-power that you have rented, either as principal or agent, to the property in question? *A.* I never rented any.

Q. Then if you should be permitted to answer this question, your answer would be what, in your opinion, it would cost to reproduce this water-power by steam at the point in question? *A.* Yes, sir.

270

Mr. DYKMAN—I object to it on the ground that it is improper, immaterial and incompetent, to prove the cost to reproduce a thing in order to prove its value. I submit the witness is not competent to answer the question.

Q. Read?

Mr. DYKMAN—I ask the Commissioner to direct the witness to give a categorical answer. Can you state its value? That is the question.

A. I can make an estimate of the value.

Mr. DYKMAN—I move to strike out the answer on the ground that it is not responsive. He was asked if he could state the value. 271

By Mr. MARSHALL:

Q. Now, Mr. Jenckes, how wide is this so-called valley, at the lower end of which you state a dam could be erected? *A.* At the bed of the stream it is about 12 to 15 feet wide.

Q. And at the top of the banks, about? *A.* The top of the banks of the stream?

Q. I mean at the top of the banks on each side of this valley?

Objected to on the ground that the plaintiff does not own both sides of the stream; it is not the subject of this litigation. 272

A. I can't answer that question in regard to the width at the top of the banks.

Q. Does not the width at the top of the banks bear any relation whatever, in the question of water-power to the water-power developed; in other words, does the size of the pond created by the dam bear any relation to the question of water-power? *A.* Well, the top of the dam would relate, but the top of the bank is too indefinite.

Q. The size of a pond which results from a dam, does it bear no relation to the water-power?

Objected to on the ground that it is impossible to answer the question; there is no fall, area, width, height or flow given. 273

A. I don't think I can really answer the question in that form.

Q. Assuming the same height of dam in two ponds, one covering 100 acres, and one covering 5 acres—the same height of dam—is there any difference in the water-power developed?

Objected to on the ground that it is too remote; it is impossible to answer.

274 *A.* There would be a difference in value, yes.

Q. Well, what difference in value; what does it consist in? *A.* A pond covering 100 acres would give a more uniform power than one covering 5 acres, owing to the capacity for storage in the pond.

Q. Did you in your examination of this so-called valley at Mr. Pine's land reach any conclusion at all as to the size of the pond which would result from the construction of the dam to which you referred?

Objected to that no dam can be constructed unless you took in lands not owned by Pine.

A. In a general way; yes.

Q. Now, what size?

275

Same objection.

A. The pond maintained by a dam at the head waters of the pond at the lower end of Pine's land would be in the neighborhood of half a mile long and vary in width from 200 feet at the dam to the width of the bed of the stream at the upper end——

Q. How wide? *A.* Well, about 12 feet—and would be about 500 feet at the widest point.

Q. You have given, Mr. Jenckes, the width and length; you haven't mentioned the depth, I think.

Mr. DYKMAN—At what point?

A. The depth at the lower end where the dam
276 would be erected would be about 10 feet.

Q. Now, Mr. Jenckes, assuming the case of a river about 12 feet wide in which the average flow was 24,000,000 gallons a day, through a valley of a size which permitted, by the construction of a dam, a pond about half a mile long, about 200 feet wide at the dam, 12 feet wide at the upper end, being about 500 feet at its widest part, and having a depth at the dam of 10 feet, can you as a civil engineer, state from those facts the value of the water-power which could be developed at the dam, taken in connection with the cost of steam-power?

Mr. DYKMAN—I ask the Commissioner to direct the 277
witness to answer the question in relation to what value in dollars and cents.

A. No, sir; not with that information.

Q. Is there any way by which you, as a civil engineer, can estimate the value of water-power? *A.* I can make an estimate of its value; yes, sir.

Q. How do you do it? *A.* You require the quantity of water and the fall.

Q. The quantity of water you understand from the Byram river, to be 24,000,000 gallons of water per day, averaged throughout the year? *A.* Yes, sir.

Q. The fall at this dam to which you have referred, which you say can be constructed at the foot of the valley, is about 10 feet? *A.* Yes, sir. 278

Mr. DYKMAN—He didn't say that.

Q. What fall could you get at the dam? *A.* About 10 feet.

Q. Then in the question I have given you have the quantity of the water and the fall? *A.* No, sir; I beg pardon, that is not in the question I said I could not answer.

Mr. MARSHALL—I will add to the question, the fall at the dam being about 10 feet.

Question repeated.

Q. Now, Mr. Jenckes, assuming the case of a river about 12 feet wide, in which the average flow was 279
24,000,000 gallons per day, through a valley of a size which permitted, by the construction of a dam, a pond of about half a mile long, about 200 feet wide at the dam, 12 feet wide at the upper end, being about 500 feet at its widest part, and the fall at the dam being about 10 feet, can you, as a civil engineer, state from those facts the value of the water-power which could be developed at the dam, taken in connection with the cost of steam-power?

Mr. DYKMAN—I object to the question so far as it relates to its being taken in connection with the cost of steam-power.

280 Mr. MARSHALL—Strike out the words: "In connection with the cost of steam-power."

A. I can only make an estimate of the cost to reproduce it in steam.

Q. Could you state the horse-power that could be developed at such a dam? *A.* Yes, sir.

Q. Beginning with your graduation from the Sheffield School, will you kindly give us the history of your work as a civil engineer? *A.* January 1, 1888, I began work as assistant engineer on the water-works at New Rochelle; I remained there until the fall of that year, and then under the same man as principal had charge of construction of private water-works at
281 New Dorp, Staten Island, at Cranstons, N. Y., and at Rhinebeck, N. Y.; I then was employed by Vermeule & Bien, in the topographical survey of the Croton watershed for three months; I then made plans, estimates and specifications for a water-power plant at Rainbow on the Farmington river, near Hartford, Conn.; then I think in August of 1889, I was employed by Cheney Brothers of South Manchester, Conn., and had charge of all their construction and outside work, including the construction of the water-works for the City of South Manchester, repairs in their mills, new buildings and the sewerage system for the town, together with considerable work on the South Manchester Railroad; I then was employed by the New York,
282 New Haven and Hartford Railroad Company as draftsman and office assistant on the new four track work from Portchester to Glenbrook; I was then City Engineer of Stamford, Conn., for about seven months; at that time, in December, I think, 1896, I was employed as purchasing agent for the G. H. Hammond Company, of Hammond, Ind., buying all their supplies and machinery for their plant, and for the construction and operation of the Chicago, Hammond and Western Railroad Company, and some of the allied companies with the G. H. Hammond Company; on the 15th of May in

this year, I took the position of Superintendent of 283
Public Works at Stamford, which position I now hold.

Q. You referred to certain private water supplies that you had looked after at Cranstons and Rhinebeck; whose were those? *A.* At New Dorp, it was for the Vanderbilt tomb and property about it; at Cranstons it was for J. P. Morgan, and at Rhinebeck it was on Levi P. Morton's place.

Q. Can you give an idea of the magnitude of the water-power at those places, or the quantity of water used? *A.* At those three points it was very small; at Cranstons it was a small brook; at New Dorp it was a brick well, sunk near a stream, and at Rhinebeck it was a brick well, sunk near a stream.

Q. What was it at Manchester? *A.* At Manchester, 284
it was a dam on a small stream; in fact, we had several dams on different streams at Manchester.

Q. What flow of water did you develop there? *A.* We consumed about a million gallons a day, from the new reservoir that I built.

Q. Who were Vermeule & Bien? *A.* Civil engineers in the City of New York.

Q. Employed by the City of New York, were they? *A.* The details of their connection with the City of New York, I don't know.

Q. But you say the work that you did was in relation to the Croton watershed? *A.* Yes, sir.

Q. Now you tell us that as a civil engineer you could estimate the horse-power? *A.* Yes, sir. 285

Q. Having the facts that I stated to you in relation to a pond flowing through a valley? *A.* Yes, sir.

Q. State to us the water-power that could be developed under the facts stated to you?

Objected to unless the facts confine the witness to the land which is the subject of this litigation.

Q. (Repeated) Now, Mr. Jenckes, assuming the case of a river about 12 feet wide, in which the average

286 flow was 24,000,000 gallons per day, through a valley of a size which permitted, by the construction of a dam, a pond about half a mile long, about 200 feet wide at the dam, 12 feet wide at the upper end, being about 500 feet at its widest point, and the fall at the dam being about ten feet, can you as a civil engineer state from those facts the horse-power which could be developed at the dam, it being admitted that Mr. Pine only owns one side of the river? *A.* Yes, sir.

Q. Now, will you state the horse-power? *A.* About 40 horse-power—I beg pardon (referring to paper), 33 horse-power that should be.

Q. Now, is there known to the profession of civil engineering a value to such horse-power? *A.* No
287 definite value.

Q. Taking the cost to produce horse-power by steam, can you state relatively the value of such horse-power?

Mr. DYKMAN—A categorical answer, yes or no.

Question withdrawn.

Q. Is there a known figure of cost of the production of horse-power by steam?

Objected to as irrelevant, incompetent and immaterial.

A. It varies so at different points that I couldn't
288 give any definite answer.

Recess.

After recess.

By Mr. MARSHALL:

Q. Mr. Jenckes, did you find Mr. Pine utilizing any horse-power on that stream there? *A.* No, sir.

Q. Did you find any manufacturing business going on there? *A.* Yes, sir.

Q. Will you state what you found? *A.* He has a 289
mill on his premises.

Mr. DYKMAN—I object to the answer on the ground that the witness does not know where his property lines are. He saw a mill somewhere.

A. (Continued) There is a mill near Mr. Pine's house where feldspar, which is quarried in the vicinity, is crushed and ground.

Q. Did you go in that mill? *A.* Yes, sir.

Q. Did Mr. Pine go with you? *A.* I don't remember whether Mr. Pine himself went with us or not.

Q. Was he there on the premises when you visited his alleged premises that day. *A.* A man representing 290
himself to be Mr. Pine was there.

Q. How is that mill operated? *A.* By steam-power.

Q. Did you examine the mill and the steam plant? *A.* Yes.

Q. Did you examine the engines? *A.* I looked it over, yes, sir; I didn't examine it closely.

Q. Do you know what kind of an engine it is? *A.* I don't know the maker's name.

Q. Scientifically, do you know what it is? *A.* It is a plain, side-valve engine; that is the trade name for it.

Q. Now, Mr. Jenckes, have you made an estimate of the value of the estimated water-power which you testify might be developed by a dam across the little valley? 291

Objected to on the ground that the witness has already stated that he could not state its value, but could state the cost to reproduce it.

A. No.

Q. You have not made any estimate? *A.* Not of the value, no, sir.

Q. Have you made an estimate of the cost of reproducing the 33 odd horse-power there which you say could be determined from reproducing it in steam? *A.* Yes, sir.

292 *Q.* Now, what is your estimate?

Objected to as incompetent, improper and immaterial, the question not being one of reproduction, but of value, which the witness admits he is unable to state.

A. About $1,080 a year.

Q. Amplify that statement, Mr. Jenckes? *A.* It would cost to produce 33 and a fraction horse-power by steam in a similar plant to the one at present operated about $1,080 a year.

Q. You include in that the cost of the necessary plant? *A.* The interest on the plant is included.

Q. Then this $1,080 is simply the disbursement for
298 the running expenses, plus the interest on the capital invested in the plant? I want to analyze that figure? *A.* It is the cost of the disbursement, as you term it, plus the interest on the capital invested in the plant, and an allowance for depreciation in the plant.

Q. Now, will you give me the figures, if you have them there, of the cost of the plant upon which you calculate the interest?

Objected to as incompetent, improper and immaterial.

A. A plant of that character would cost about $22 per horse-power.

Q. And you say it would develop 33 horse-power?
294 *A.* What would develop 33 horse-power?

Q. Your steam plant would develop how much horse-power as calculated by you? *A.* The steam plant that cost $22? One horse-power; that is per horse-power.

Q. And the water-power you testified was 33 horse-power, didn't you, which was to be developed there by the use of the water over the dam? *A.* Yes.

Q. Now, to develop the 33 horse-power then would cost $666?

Mr. Dykman objects to all these questions.

A. To put in the steam plant to develop an equal 295
amount of horse-power?

Q. That is the question.

Objected to.

A. In that vicinity; about that.

Q. $666? *A.* Yes.

By Mr. WILLIAMS:

Q. Could you buy a boiler and steam engine for $666 to produce 33 horse-power?

Same objection.

A. Yes; I think so.

Q. Now, go on with your elements of what made up 296
this cost of $1,080 per year?

Same objection to all these questions.

A. The cost of the coal.

Q. What is the cost of the coal?

Same objection.

A. I estimated the cost of the coal there $4.50 a ton.

Q. And how many tons? *A.* Well, I didn't figure the actual tons; that is, I haven't shown it here; I figured it, but I haven't it at hand.

Q. What did you allow for a man to run the engine? 297

Same objection.

A. $8 per horse-power per year.

By Mr. MARSHALL:

Q. That enters into this figure of $1,080—that $8 per horse-power per year? *A.* Yes, sir.

Q. What part of the total is the $8 per horse-power per year? *A.* What proportion?

Q. Yes? *A.* About a fourth.

Q. What is your total allowance, then, for a man to

298 run the engine—the total; if it is $8 per horse-power per year, what is it for the entire horse-power to be developed?

Same objection.

A. Why, for 33 horse-power it would be $264.

Q. And that comes out of the $1.080? *A.* Yes, sir.

Q. Now, go and give me what else makes up the $1,080?

Same objection.

A. There was $20.25 per horse-power per year for coal.

299 *Q.* Won't you give us the total of that?

Same objection.

A. $668.25.

Q. Now, what is the next element?

Same objection.

A. There was $1.11 per horse-power per year for the interest on the plant.

Q. And what is the total of that? *A.* That would be $36.63.

Q. Is there any other item?

Same objection.

A. Yes, sir; there was $2.23 per horse-power per
300 year for the depreciation of the plant.

Q. What is the total? *A.* $73.59; and there was 50 cents per horse-power for oil and waste; figuring all those things out, that figures up $1,058; there were some fractions in there that I left off.

Q. Now, in your estimate, you funded that, didn't you? *A.* Yes, sir.

Q. And I want to know the figure at which you funded it? *A.* Five per cent.

Q. What is the total?

Same objection.

A. That was the 33 horse-power; slightly over $21,- 301
000.

Q. Did you make any deductions from that for any element whatever, from the $21,000? *A.* Yes, sir.

Q. Now, what? *A.* I made a deduction for the cost of developing the horse-power.

Q. What was it? *A.* It was about $5,000.

Q. You got a net result of what? *A.* About $16,000.

Q. This was assuming the cost of coal at $4.50 per ton? *A.* Yes, sir.

Q. Now, assuming that the flow in this hypothetical river is reduced from 24,000,000 gallons per day to 16,000,000 gallons per day, can you give us the same figures, allowing for that altered condition, of 16,000,000 instead of 24,000,000 gallons? *A.* Yes, sir; 302
it would be about $14,000, and the cost of the development about $4,000, making a net of about $10,000.

Same objection.

Q. And a net loss, under these hypothetical conditions, of what? *A.* Of $6,000.

Q. About $6,000? *A.* Yes, sir.

Q. Mr. Jenckes, can the water-power which you state can be developed at this point be transmitted?

Same objection.

A. Yes, sir.

303

Q. For what distance? *A.* Any reasonable distance.

Q. What is a reasonable distance? *A.* Oh, it could be transmitted—let's see, that is a small power—25 miles.

Q. With what loss in efficiency, if any? *A.* From ten to twenty-five per cent, according to the distance.

Q. Now, do I understand you that the location of this present manufacturing plant of Mr. Pine, where he manufactures by steam, would interfere at all with

304 the utilization of this water-power for any other manufacturing purpose?

Objected to as calling for a conclusion of the witness.

A. No.

Q. When you visited this locality on the 25th of May, did you make any examination of what is known as the West Branch of the Byram river? *A.* I went to the junction of the two branches.

Q. What did you find there in respect to the comparative flow? *A.* Well, there was a considerable volume of water coming down the East Branch and very little down the West Branch.

305 *Q.* Now, Mr. Jenckes, assuming the case of two rivers of substantially equal size in point of width and length, which meet each other at a given point, one of which flows through a swampy territory, or a marsh, and the other of which flows over the hard surface of the land: which, I want to ask you, is, from a standpoint of a civil engineer, regarded as the more valuable water supply?

Same objection.

A. Why, under the same conditions in regard to area of watershed, the one which was swampy would be preferable, in my opinion.

306 *Q.* And why? *A.* The swampy ground holds back the water during the wet seasons and would let it down, to some extent, during the dry seasons.

Q. Have you ever had any actual case where you have been able to make a comparison of two such streams, or streams approximating those conditions? *A.* Well, I call to mind two reservoirs which we had at South Manchester, where it was quite noticeable; the sides of one were steep and rocky, with no swamps, and the flow was very irregular; the other flowed through swampy land, with some springs, and the flow was much more constant.

Cross-examined by Mr. DYKMAN: 307

Q. Will you please tell me the last place where you, as a civil engineer, had occasion to replace water-power by steam-power? *A.* I never replaced it in actual construction.

Q. Were you ever connected as a chief engineer or assistant engineer where that thing was done? *A.* No, sir.

Q. Your testimony, as I understand here, is based entirely on the hypothetical average flow of a stream? *A.* Yes, sir.

Q. Please tell me any case known to the profession or from any book which you have read, which you recognize as an authority in your profession, where the 308
average flow of a stream was used as a basis in your profession, either for supplying power or water for domestic or household uses, the average flow of a stream from January to January; tell me the place? *A.* I cannot tell you the place.

Q. Whom do you recognize as an authority on such a question in your profession, of hydraulic or civil engineer, where water supplies power? *A.* You mean as an authority in books?

Q. Yes?

Objected to, on the ground that defendants' counsel has conceded that the witness is a qualified expert.

Q. Fanning? *A.* Fanning is an authority on that 309
subject; yes, sir.

Q. What other authorities do you recognize? *A.* I don't recall the names just now.

Q. What books have you read on the subject?

Same objection.

A. I have read parts of a great many.

Q. Name me one, besides Fanning, out of the great many you have read?

Same objection.

310 *A.* I couldn't name you one to-day.

Q. Can't name me one, out of the great many? *A.* No, sir.

Q. I assume also that in making your statements or calculations here to Mr. Marshall, that you have assumed that this owner had a right to build and maintain a dam across the Byram river and hold the waters back for the length that you have stated?

Objected to as incompetent, immaterial and irrelevant, and further that the witness has said upon his direct examination that he knew Mr. Pine—that he had been told that Mr. Pine did not own on the other side of the Byram river.

311 *A.* I know that he did not own on the other side; I have not assumed that.

Q. Have you assumed that there is any dam there at all; have you not assumed that there was a dam? *A.* In making the estimates, I have assumed that the dam was erected.

Q. And that that dam, regardless of ownership, had a right to stay there, otherwise the water could not be kept back? *A.* Yes, sir.

Q. That was your assumption, was it not? *A.* Yes, sir.

Q. And if it should turn out in this proceeding, or any other, that a dam could not be built there by this plaintiff alone across the river and the property covered
312 with water to the extent which you have mentioned, then your calculation would be erroneous, would it not, if the dam could only go one-half of the river? *A.* It would be impossible to build a dam over half the river.

Q. Then so far as your profession is concerned, with an ownership on one side of a stream, treating it entirely as separate and distinct from the other side, you could not develop any horse-power whatever from it? *A.* No, sir; you could not.

Q. You also assume, do you not, in making this calculation of the horse-power that could be devel-

oped there, that a dam could be kept there, and that 313
the person or persons owning that dam had the right to fill this pond, regardless of the ownership below, did you not? *A.* Yes, sir.

Q. And if they did not have the right, when the water was low, to stop the gates and shut them tight, and fill that pond, that would change your calculation, if they were obliged to let the natural flow go down the stream as it came to them? *A.* The natural flow would go through the appliances for creating the horse-power, and be put into the stream again.

Q. You have used the word "average," have you not? *A.* I don't think I have used the word.

Q. I mean in answering a hypothetical question? *A.* Yes, sir. 314

Q. 24,000,000 gallons a day? *A.* Yes, sir.

Q. Then in order to get that average, there must be times when the stream is greater and also less? *A.* In making those figures——

Q. I am taking the hypothetical questions put by Mr. Marshall. (Question repeated.) *A.* Why, yes.

Q. Now, then, in order to get this horse-power, you must have storage capacity, must you not? *A.* Some; yes, sir.

Q. In order to get that storage capacity, you must at some time shut the gates to a certain extent? *A.* Yes, sir.

Q. Then you are assuming, are you not, that the man operating the mill, or whatever you may call it, has the 315
legal right to shut that gate to a certain extent? *A.* Yes, sir.

Q. A perfect legal right; then if he did not own that legal title, and it was put to you as a hypothetical question that he, the owner, did not possess that right, your answer, of course, would be different? *A.* Yes, sir.

Q. You say you found a mill on this property? *A.* Yes, sir.

Q. How large? *A.* How large is the building?

Q. How large, yes; I mean the buildings in use?

316 *A.* It was in two parts, or more properly, three buildings, I should say; one building where the machinery was about 40 feet by 25.

Q. A new building? *A.* No, sir; not a new building.

Q. New machinery? *A.* No, sir; not new machinery.

Q. No water flowing by there? *A.* Flowing by the mill; the brook flows about 150 feet from it.

Q. How far from the brook in question, meaning the East Branch of the Byram and the brook formed by the natural drainage, was this mill? *A.* Why, it isn't on the East Branch of the Byram, as I understand it; the East Branch doesn't come there.

317 *Q.* The East Branch of the Byram river empties into the Byram above this property? *A.* Yes, sir.

Q. Take the Byram river; how far is the feldspar mill from the Byram river? *A.* About 150 feet.

Q. No water conducted to it, is there? *A.* Only in a pipe for the supply of the boilers, and so forth.

Q. The mill is not dependent upon the flow of the river for the purpose of creating power? *A.* Only the water for the boilers.

Q. How large a pipe is that? *A.* About 1½ or 2-inch pipe.

Q. Will a 2-inch pipe supply the water to the boilers? *A.* I think the suction of the pump was about two inches.

318 *Q.* You mean to say the suction of the donkey pump or small pump supplying the boilers was supplied by a 2-inch pipe? *A.* I didn't look at the suction pipe; about 2 inches.

Q. Did the 2-inch pipe go directly into the boiler? *A.* No, sir; it went to a pump.

Q. Then a donkey pump, or small pump, pumped the water from the 2-inch pipe into the boilers; is that right? *A.* Yes, sir.

Q. And that is the only use at the time you were there to which the waters of the Byram were put? *A.* Yes.

Q. What did you see on the stream itself, what

mills were there on the stream? *A.* None nearer than the 319
mill mentioned.

Q. Then, on the Pine property there is no mill directly on the Byram river? *A.* None nearer than the mill mentioned.

Q. None on the Byram river. *A.* Well, 150 feet.

Q. Is there any on the Bryam river? Please answer me, yes or no. *A.* There is none directly on the river, but it is about 150 feet from the river.

Q. I asked if there is any on the river. *A.* There is none directly on the river.

Q. There is a mill operated by steam 150 feet from the bank of the river? *A.* Yes.

Q. From which river runs a pipe about two inches in size used for the purpose of supplying the boilers? *A.* 320
Yes, sir.

Q. And that was in operation when you were there? *A.* No, sir.

Q. It wasn't? What was in operation? *A.* Nothing.

Q. No mill? *A.* It wasn't running when I was there.

Q. Did you make a calculation as to the fall through the Pine property of this stream, mathematically, by surveys? *A.* I had a survey made.

Q. Made under your direction? *A.* Yes, sir.

Q. What did you find the fall? *A.* 9.92 feet.

Q. You spoke about being employed by Vermeule & Bien, in making a topographical survey of the watershed of the Croton; do you mean to be understood as testifying that you had actually surveyed the Croton watershed? 321
A. Portions of it—yes, sir.

Q. What portions? *A.* I worked at Katonah.

Q. How long were you at Katonah? *A.* Only a few days in each place at a time.

Q. Name me the places? *A.* I was at Katonah; I was at Pine's Bridge; I was at Yorktown.

Q. Did you use any map in procuring your contour lines? *A.* The contour lines were on the map when they were sent to me.

Q. Wasn't it generally understood that the contour

322 lines were taken from the map made by William E. Worthy and Mr. Craven years ago?

Objected to as immaterial, irrelevant and incompetent.

A. I don't know about that.

Q. Well, you ran no contour lines through that country, did you? *A.* No, sir.

Q. You were not employed by the City in any capacity at that time?

Further objected to upon the ground that the other side have conceded the competency of this witness.

323 *A.* I was employed by Vermeule & Bien; I had no connection with the City of New York.

Q. Did you use the storage reservoir to which you have referred in making your calculations as to the horse-power? *A.* It would be probably needed through portions of each day.

Q. Did you make a calculation as to the number of gallons of water you could store there? *A.* No, sir.

Q. Wasn't it quite important to make such a calculation in order to ascertain what you could depend upon in times of drought? *A.* Well, I made a liberal allowance.

Q. Is it not necessary as an engineer to make that calculation, in calculating the horse-power? *A.* To make an accurate calculation, yes.

324 *Q.* You didn't make it, did you? *A.* No, sir.

Q. Did you make any calculation as to the evaporation of the water from the surface of the reservoir, the loss so far as ponding is concerned, in making your calculations of horse-power? *A.* No, sir.

Q. You started out, if I remember correctly, with a certain number of square miles and a certain number of gallons per day? *A.* I had nothing to do with the drainage area.

Q. You simply assumed that 24,000,000 gallons of water per day going through there? *A.* Yes, sir.

Q. What dam is there on the Pine property, that 325
you saw there? *A.* None on the Pine property.

Q. What dam is there on the Pine property, together with the property on the opposite side of the river, that you saw? *A.* There is a dam near the lower end of Mr. Pine's property; I don't know whether it is on his property or not.

Q. Did you ask anybody whether that dam was on the Pine property or not? *A.* No, sir; I did not.

Q. You can't tell now whether it was or was not? *A.* I cannot.

Q. Can you locate the dam that you saw, on the minutes here, so that we can locate it on a map or survey? *A.* It was a dam a little less than a quarter of a mile—considerably less than a quarter of a mile— 326
below the entrance to Mr. Pine's place.

Q. You have stated in your direct examination that you could not state the value of the power, but could tell Mr. Marshall the cost to reproduce it; that is correct? *A.* Yes, sir.

Q. You don't pretend to come here and state the market value of a water-power or mill-power on that river; that is to say, what it would bring in the market between private individuals? *A.* No, sir.

Q. Is it or is it not a fact that it might cost considerable money to develop the power in a region where there would be no market? *A.* Yes, sir.

Q. Do you know where the Housatonic river is? *A.* Yes. 327

Q. Do you know Lakeville, Connecticut? *A.* I have been there.

Q. When you were there did you notice that the waters of the Housatonic river were turned into a large canal constructed of stone masonry running a long distance for the purpose of furnishing a water-power for the railroad there?

Objected to on the ground that it is immaterial, irrelevant and incompetent.

A. I paid no attention to it; I don't think I noticed it.

328 *Q.* As an engineer, with the exception of the water necessary to be furnished for the boilers at this Feldspar mill, how would the deprivation of the water of the Byram river affect running the mill? *A.* It would not affect it, with the exception of the water for the boilers.

Re-direct examination:

By Mr. MARSHALL:

Q. You stated to Mr. Dykman that the actual fall as shown by the survey was 9.92 feet? *A.* Yes, sir.

Q. In the question that was put to you, the fall assumed was 10 feet; does the difference between the two falls, between 10 feet and 9.92 feet, alter materially
329 in any respect the figures you have testified to? *A.* No, sir; the difference between those two might be accounted for by unevenness in the bed of the brook where the level was taken.

Q. I also understood Mr. Dykman to refer to an assumption on your part of a regular flow of 24,000,000 gallons per day; you understood me to say an average flow, did you not, of 24,000,000 gallons per day? *A.* Yes, sir.

Q. Are there mills along the Byram river? *A.* Through the whole length; yes.

Q. Many of them; one, two, three or four? *A.* I know three.

Q. Where are they? *A.* There is Hawthorne Mill,
330 Tingue, House & Company and a bolt factory down below there, near the Byram river; I don't know whether they use water from the river or not; and there is a small mill just below the dam that I mentioned.

By Mr. WILLIAMS:

Q. Do you know whether there are any further up the river? *A.* Well, I saw none.

By Mr. MARSHALL:

Q. Are there manufacturing establishments at Portchester? *A.* I am not familiar with them.

Q. Are there any there? *A.* I couldn't say. 331

Q. You don't know of any manufacturing establishments at Portchester; I don't mean on the river; I will take any manufacturing establishment going on there?

Objected to.

Mr. DYKMAN—We will admit that three-quarters of a mile from the river there is a shirt factory run by steam.

A. I have seen a large factory near the depot at Portchester.

Q. Then there are manufacturing industries at Portchester? *A.* Yes, sir. 332

Re-cross examined:

By Mr. DYKMAN:

Q. And at New Rochelle and Pelham? *A.* Yes, sir.

Q. Assuming this pond to be full—that is, the reservoir which you have testified to—varying in width from 300 to 500 feet and 12 to 15 feet and a fall of 10 feet, if they should draw that 10 feet down it would decrease your head? *A.* Yes, sir.

Q. And the ratio of decrease of power is far greater than the ratio of decrease perpendicularly in the water that you draw from the pond, per foot? *A.* The power for an equal amount of water is proportionate.

Q. I beg your pardon; you don't understand me. 333
Assume your pond is full? *A.* Yes, sir.

Q. You draw a foot of water off the surface? *A.* Yes, sir.

Q. Now, the ratio of decrease in drawing that water per gallon, or per cubic foot, per second would be greater, would it not, so far as the loss of power was concerned, than the actual horizontal decrease in the water; in other words, you would lose more in drawing that first foot than you would in drawing the next foot, and so on; wouldn't there be a greater loss of power after you had drawn the first foot down;

334 would there be as much power in the second foot as there was in the first? *A.* Why, no, because there wouldn't be so much water in the second foot.

Q. Wouldn't the head have something to do with it? *A.* Independent of the quantity of water, the power is exactly proportionate to the head.

Q. Do you mean to tell me there is as much power between the 9 and the 8 foot mark as between the 10 and the 9 foot mark in that reservoir? *A.* No, sir.

Q. And there is less when you go from the 8-foot mark down to the 7-foot mark? *A.* Yes, sir.

Q. And still less in proportion when you go from the 6 to the 5? *A.* Yes, sir.

Q. Now, isn't the ratio of decrease in power greater
335 from the 6 down to the 5, in proportion, than it is from the 10 to the 9? *A.* Yes, sir.

By Mr. WILLIAMS:

Q. Mr. Jenckes, would it be possible, leaving aside the question how far you have to flow, to develop at the point you have suggested a dam might be put, a much larger amount of horse-power; of water-power?

Objected to, unless confined to the lands owned by the plaintiff.

A. With a larger storage reservoir, I think you could develop more power.

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Mr. DYKMAN—We will admit that.

Q. Is it practicable at that particular point to build a dam 15, 20 or 25 feet high, economically, to develop a greater amount of horse-power?

Objected to, unless confined to the lands of the plaintiff.

A. It is practicable; yes; it is possible; possible, that is better.

Q. Is the topography of the land such as to enable one 337
to do that, at that point, at the foot of the little valley to which you have referred? *A.* Yes.

Q. Then it would be, in your opinion, practicable to develop a considerable horse-power at the foot of that little valley you have referred to? *A.* I couldn't say as to the practicability of it, without looking into it further.

LAWRENCE B. JENCKES.

Subscribed before me }
March 20, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

JULY 19, 1899.

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Further hearing adjourned to Wednesday, July 19, 1899, at 10.30 A. M.

Adjourned by request of the Examiner to a day to be fixed.

AUGUST 3, 1899.

Further testimony for complainants, taken before JAMES A. RENWICK, Esq., U. S. Examiner.

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Appearances—Mr. WILLIAMS for complainants; Mr. MARSHALL, of counsel; Mr. DYKMAN, for defendants.

NEWTON S. JOHNSON, called as a witness for the complainants, being first duly sworn, testified:

Direct examination:

By Mr. MARSHALL:

Q. Where do you live? *A.* Glenville, Conn.
Q. Whereabouts there? *A.* On Mr. Pine's place.

340 *Q.* Are you related to Mr. Pine? *A.* Yes, sir; Mr. Pine is my father-in-law.

Q. How long have you lived there? *A.* Seven years.

Q. What is your occupation there? *A.* Well, I look after the feldspar mill.

Q. What is the size of Mr. Pine's farm there? *A.* 106 acres.

Q. Does it lie along the Byram river? *A.* Yes, sir.

Q. What use do you make of the waters of the Byram river? *A.* Well, we use it for feeding the boiler and we also use it for household purposes, and our pasture lots lie on it.

Q. Just state the number of your pasture lots and how they lie. *A.* We have four pasture lots north of the
341 house, on the river, and two below.

Q. They lie on the river? *A.* On the river; yes, sir.

Q. There is a pond on Mr. Pine's property, is there not? *A.* Yes, sir.

Q. Part of his property is flowed over by a pond, is it not? *A.* Yes, sir.

Q. Does this pond lie entirely on his land? *A.* No, part of it lays on his property.

Q. How does the boundary line of his property run with reference to that pond? *A.* The boundary line runs through the pond.

Q. How long have you have you been carrying on the feldspar business there? *A.* Six years.

Q. Have the manufacturing buildings been erected
342 within that time? *A.* Yes, sir.

Q. Have you conducted that business yourself? *A.* I have.

Q. Now, is that business a profitable business?

Objected to by defendants' counsel as incompetent, improper and immaterial.

A. Yes, sir.

Q. It is at present a profitable business?

Same objection.

A. At present, yes, sir. 343

Q. How many head of stock do you keep on that farm? *A.* We have six head of horned cattle and five horses or six horses.

Q. Mr. Johnson, have you noticed any diminution in the flow of the Byram river along Mr. Pine's property in the six years you have been there? *A.* Yes, sir.

Q. Can you give us any idea of what you have noticed? *A.* Well, how do you mean?

Q. As I understand you, you say that you have noticed a diminution in the stream? *A.* But at different times.

Q. Now will you state the extent of it and what time? *A.* Well, I have seen it very nearly dry certain 344
times of the year; two years ago this month it was nearly dry, and even this last spring it was very low.

Q. Had you ever noticed any such diminution prior to two years ago? *A.* No, sir; not to any extent.

Cross-examined by Mr. DYKMAN:

Q. Have you seen the waters of the Byram river so low that cattle couldn't get enough to drink? *A.* No, sir.

Q. What other water is there on the farm of Mr. Pine besides the Byram river? *A.* In the very wet season from the swamp we have a little water that is not fit for cattle to drink.

345

Q. Have you any well on the property? *A.* Yes, sir.

Q. Make any use of that? *A.* Yes, sir.

Q. What use? *A.* Drinking water.

Q. Any water other than the well and the river? *A.* This swamp I speak of.

Q. Any springs? *A.* No, sir.

Q. How are the cattle watered in the winter? *A.* Last winter—well, nearly every winter we take and carry it from the river.

346 *Q.* You carry it from the river to the barn where the horses are? *A.* Yes, sir.

Q. How were your cattle watered during this extreme dry spell that you mentioned? *A.* We got water from the river.

Q. What connection has the river with the feldspar plant, other than furnishing water for the boilers? *A.* Nothing at all.

Q. How much water do you use a day for the boilers on the average? *A.* I am not prepared to answer that; we have an eighty-horse boiler?

Q. You can't tell me the quantity of water you use? *A.* No, sir; not for the boiler.

Q. How large is the feed pipe? *A.* One inch and a
347 quarter.

Q. Does that run direct into the boiler or into a well where you use a donkey pump? *A.* We dug a canal two years ago to get the fall into a cistern; we draw it from the cistern.

Q. With a donkey pump? *A.* Well, we use an injector; same thing; for the same purpose.

Q. You have always had water enough for that? *A.* Yes, sir.

Q. No part of the feldspar plant gets its power from the Byram river? *A.* Only for feeding the boiler.

Q. The plant is run by steam? *A.* Yes, sir.

Q. And always has been; now this pond that you speak of—there is no pond on the property of Mr. Pine
348 alone? *A.* No, sir.

Q. There is no dam on the property of Mr. Pine alone? *A.* Not alone.

FREDERICK MULLER, one of the complainants, recalled, testified:

By Mr. MARSHALL:

Q. Mr. Muller, you are one of the plaintiffs in this action against the City of New York to obtain an injunction against the City for diverting the waters of the Byram river? *A.* Yes, sir.

Q. How long have you lived on the farm there on 349
the Byram river—the West Branch of the Byram river?
A. Nine years.

Q. Have you during those nine years noticed that the flow of the West Branch of the Byram river had diminished? *A.* Oh, yes.

Q. When did you notice that? *A.* Well, about, I should say, about two years ago.

Q. Well, now, can you tell us what you saw? *A.* Well, I seen that the water was getting less and less.

Q. To what extent did it grow less; what was the least water that you have seen in those two years in the West Branch of the Byram river? *A.* I seen it so I could walk through it; the water was almost to a standstill, no movement in it. 350

Q. When did you last see the water almost at a standstill? *A.* I seen it not long ago.

Q. This summer? *A.* Yes, sir.

Q. Did you ever see it as low as that prior to two years ago? *A.* Yes, I have; not before that, but in the last two years.

Q. But I mean before two years ago did you ever see it as low as that? *A.* No, sir; I never seen it as low as that.

Q. The East Branch of the Byram river flows through your farm, does it not? *A.* Yes, sir.

Q. Do the two streams unite on your farm? *A.* Yes, sir.

Q. Prior to two years ago, was there any difference 351
in those streams in the summer time as to the quantity of water? *A.* There was always more water coming through the east stream than the west stream.

Q. There was more water coming through the East Branch of the Byram river? *A.* Here lately.

Q. I mean prior to two years ago, before the water of the West Branch was taken was there any difference between the two streams in the summer time? *A.* I couldn't tell.

Q. You don't remember; which had the most water

352 in it in the summer time? *A.* Oh, the West Branch had the most water.

Q. In the summer time? *A.* Yes.

Q. What is the condition of the East Branch this summer?

Objected to by defendants' counsel as immaterial.

Q. How has that been during the dry season of this summer? *A.* It is poor, but it is better than the West Branch.

Q. Better than the West Branch this summer? *A.* Yes.

Q. Does the water get pretty low in the East Branch during the summer?

353 Same objection as incompetent, improper and immaterial.

A. Yes.

Cross-examination:

By Mr. Dykman:

Q. You have no interest in what we call the Samuel Pine farm, have you; Mr. Pine owns his own place, does he not? *A.* Yes, sir.

Q. And you own yours? *A.* Yes, sir.

Q. Where is yours situated with reference to his—right opposite it? *A.* No; a little above it.

Q. You are above? *A.* Yes, sir.

354 *Q.* Does your farm cover both sides of the river? *A.* Yes.

Q. You are north of Pine's property; you are up the stream, are you not, from Mr. Pine's property? *A.* I have land on both sides of the stream.

Q. Your farm lies up the river from Mr. Pine's? *A.* Yes, sir.

Q. And the West Branch of the river and the East Branch join on your property? *A.* Yes, sir.

Q. Now, how far above the point where those two branches come together do you own? *A.* Well, they meet right on the line.

Q. On your north line? *A.* Yes, sir. 355

Q. Then your farm has both branches of the river flowing into it? *A.* Yes, sir.

Q. You know the point where the East Branch of the river strikes your property? *A.* Yes.

Q. Now, how much land do you own up towards Byram Pond from that point where the East Branch strikes the west? How far up the East Branch do you own? *A.* From the East Branch? Very little; hardly any.

Q. There is no dam on your property, is there? *A.* No, sir.

Q. You use the water for ordinary farming purposes? *A.* Yes, sir.

Q. Is that correct? *A.* Yes. 356

Q. How many acres have you there? *A.* 45.

Q. How much front on the river? *A.* 2,290 feet.

Q. On one side? *A.* No; both sides.

Q. Both sides; where do your cattle get water? *A.* Right there in the river.

Q. Have you ever seen the time when there wasn't water enough below the point where the East Branch of the Byram strikes the West Branch to water cattle? *A.* No, I have not.

FREDERICK MULLER.

Subscribed before me, }
March 20, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

357

Further hearing adjourned to a day to be fixed (to be not earlier than August 21, 1899).

358 NEW YORK, October 26, 1899.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. WILLIAMS, Mr. MARSHALL, Mr. DYKMAN.

NEWTON S. JOHNSON, recalled:

By Mr. MARSHALL:

Q. Mr. Johnson, I show you this photograph and ask you what it is. *A.* This photograph is taken from the bridge looking north.

Q. From what bridge? *A.* From Mr. Pine's bridge.

359 *Q.* Were you present when that photograph was taken? *A.* Yes, sir.

Q. Does it represent a true picture of the locality? *A.* Yes, sir.

Mr. MARSHALL—I offer that photograph in evidence.

Mr. DYKMAN—I object, on the ground that they seek by that photograph to join two pieces of property, and thus make one litigation.

Photograph marked "Complainants' Exhibit 1, October 26, 1899."

Q. When was this picture taken, Mr. Johnson, about?

360 *A.* Those pictures were taken on the 31st of August, 1899.

Q. State if you can what that photograph shows (handing witness another photograph)? *A.* That photograph shows a view from the road opposite Mr. Muller's place, across the fence; about five or six hundred feet from the East and West branches of the Byram river.

Q. Whose land does it show?

Same objection.

A. Muller's land.

Q. Were you present when that photograph was taken? *A.* Yes. 361

Q. And the view is a true view of the condition of the premises at the time? *A.* Yes, sir.

Mr. Marshall offers the photograph in evidence.

Same objection.

Marked "Complainants' Ex. 2, Oct. 26/99."

Q. Have you made yourself acquainted with the size and dimensions of the pond that lays on Mr. Pine's land, near his southerly boundary line? *A.* Yes, sir.

Q. Can you state the dimensions of that pond? 362

Mr. DYKMAN—I object to that unless it is shown that this witness knows the boundary line and unless it further appears that Mr. Pine owns both sides of the river and the bed of the pond in question.

A. (Referring to memorandum) Well, the length of the pond is 1,387 feet; the width—I measured the pond in different places; the distance of the width across the pond 25 feet above the dam is 73 feet 10 inches; and about 300 feet above the dam is 70 feet 6 inches, and remains about the same for 300 or 400 feet above, and then it tapers off a very little; the depth of the water 25 feet above the dam, 7 feet 8 inches; depth of water from 150 to 200 feet above the dam, 8 feet 9 inches; and the height of the dam 11 feet 3 inches, from the bottom to the top of the dam. 363

Q. That pond is formed by damming the Byram river? *A.* Yes, sir.

Q. Mr. Pine owns on one side of that pond?

Mr. DYKMAN—I object to the conclusion of the witness as to facts as to which he has not been shown to have any knowledge whatever, the deed being the best evidence.

A. Yes, sir.

364 *Q.* Do you know who owns the opposite side of the pond?

Same objection.

A. Yes, sir.

Q. Who owns it? *A.* Solomon Reynolds and the Pentz estate.

Q. Is there a mill below the dam at this pond?

Objected to unless it is on the property covered by the complaint.

A. Oh, yes.

Q. Whose is that? *A.* Solomon Reynolds & Son's.

365 *Q.* Has that been there many years? *A.* Yes.

Q. How many years have you known of it?

Same objection.

A. Seven years.

Q. That has been operated by the water-power coming from this pond?

Objected to as incompetent, improper and immaterial and in no wise relating to the litigation in question.

A. Yes.

Q. Have you visited that mill during the past seven years? *A.* Yes, sir.

Q. How often? *A.* Well, I couldn't say how often;

366 sometimes nearly every day in the week, sometimes once in two weeks.

Q. Have you seen it in operation from this water-power?

Mr. DYKMAN—That is objected to; what water-power?

A. Yes, sir.

Cross-examined by Mr. DYKMAN:

Q. You say that this power is operated from this pond? *A.* It has been, yes.

Q. What power do you refer to? A. Water-power. 367

Q. Where is that located? A. Why, located just above the mill.

Q. Is it on the property in question of Mr. Pine? A. No, sir.

Q. Is it on Mr. Muller's property? A. No, sir.

Q. Is it in any way connected with it? A. No, sir.

Q. This pond to which you refer, is that the only source of water supply which furnishes the power? A. Mr. Pine's property——

Q. If I am wrong, please correct me. A. I would like to explain.

Q. Is there any part of the Wilcox dam or pond on Mr. Pine's property? A. We were not speaking of Mr. Wilcox's—— 368

Q. I mean Mr. Reynolds'. A. Yes, part of it; half of it is.

Q. One-half of it? A. Yes, sir.

Q. One-half of the Reynolds' pond is on the Pine property? A. Yes.

Q. Now, Mr. Johnson, so far as your knowledge is concerned, does not own any pond on both sides of that river, does he? A. He does not, as I know of.

Q. Now, is it not a fact that the Reynolds power is operated or was operated by the waters drawn from Byram Pond, in the State of New York? A. Well, it came down the river.

Q. Do you know where Byram Pond is? A. Yes, sir. 369

Q. Was there ever a dam built there? A. Yes, sir.

Q. Don't you know that that dam was raised at different periods by certain persons? A. I do.

Q. And when there was a dry season, the water stored by the persons owning Byram Pond was drawn down through the channels of Byram river and that Reynolds' mill was operated in that way? A. Yes, sir.

370 *Q.* Does Mr. Pine own any dam as an entirety on his own property? *A.* No, sir.

Q. Then this pond that you have stated to be about 1,387 feet long and to vary in width from 70 to 73 feet is not on the property of any one individual, to your best knowledge. *A.* Any one individual? No, sir.

Q. And the pond and dam to which you refer are in no way connected with this mill on the Pine property? *A.* No, sir.

Q. There is no mill on the property in question, assuming I mean the Pine property? *A.* Oh, yes, there is.

Q. What mill? On the Pine property alone? *A.*
371 Yes, sir.

Q. Where is it? *A.* It is on the Pine farm, his feldspar mill.

Q. That is run by water-power? *A.* Oh, no.

Q. There is no mill run by water-power on the property, is the question. *A.* No, sir.

Q. The only use made of the waters of the Byram river is the water led through a small pipe to feed the boiler? *A.* That is all.

By Mr. MARSHALL:

Q. Do you know whether there has been any change in the power at this mill below this dam near Mr. Pine's line?
372

Objected to, if it seeks to prove what has happened since the City built the dam.

A. Yes, sir.

Q. When did that change take place?

Same objection.

A. Well, for the past two years it has been run mostly by steam-power.

By Mr. DYKMAN: 373

Q. What mill do you now refer to? *A.* Reynolds' mill.

Q. Are you aware of the fact that the City of New York has settled with Mr. Reynolds a number of years ago for depriving him and his property of the use of the water-power? *A.* Yes, sir.

Q. And the mill to which you now refer is the mill covered by that agreement? *A.* Yes, sir.

By Mr. MARSHALL:

Q. Mr. Johnson, this mill which has been described by the counsel on the other side as Reynolds' mill is a mill that stands on the Byram river, a little below Mr. Pine's 374 southerly boundary line, is it not? *A.* Yes, sir; 139 feet.

N. S. JOHNSON.

Subscribed before me March 19, 1900.

JAMES A. RENWICK,
U. S. Examiner.

SAMUEL VAIL, being duly sworn and examined as a witness in behalf of complainants, testified:

By Mr. MARSHALL:

Q. What is your business? *A.* Well, I am an engi- 375 neer.

Q. Whereabouts? *A.* At Mr. Pine's feldspar mill.

Q. And how long have you been there? *A.* I have been there nearly three years; three years this month.

Q. And where did you work before that? *A.* Well, I worked at various places; I couldn't mention all the places; around by the day.

Q. Have you worked along the Byram river? *A.* I have.

Q. Where? *A.* At Mr. Wilcox's place, right above Mr. Pine's, a mile and a half or so.

376 *Q.* Where else on the river? *A.* Well, I worked in Glenville, in the blacksmith shop, right at the bridge there, above the woolen mills.

Q. Anywhere else along the river, East or West Branch? *A.* No, sir.

Q. How long did you work at Mr. Wilcox's? *A.* Twelve years.

Q. What were you doing there? *A.* At the trade, blacksmithing.

Q. How near were you to the river there? *A.* Well, within fifty feet of it.

Q. How long have you lived in the neighborhood of the Byram river, or the East and West Branches of it? *A.* Since 1855.

377 *Q.* Have you lived on the East Branch of the Byram river? *A.* No, sir.

Q. Or worked there? *A.* No, sir.

Q. What is your acquaintance with the country through which the East Branch of the Byram river flows? *A.* Well, I have been through a great deal of the country through there; it is a rough, narrow valley, most of it, up through, there is very little low ground around it, very little, so far as I have been on it; I have not been to the source at all, but as far as I have been, maybe two-thirds of the river.

Q. Have you been up the West Branch of the Byram river? *A.* I have; about nearly two-thirds of that.

Q. What is the character of that section? *A.* Well, so
378 far as I have been, the lower part of it is narrow valley, rough land, until you get to the upper part of it, and then that is low ground, swampy.

Q. Is it a broad, low ground? *A.* Quite broad.

Q. Have you ever had occasion to measure or to see measured the current of the East Branch of the Byram river at that point? *A.* I once saw a dam that was made across the river that the water flowed through an auger hole—I wouldn't want to swear, but I should judge an inch and a half.

Q. How big was that auger hole? A. I should judge 379
an inch and a half.

Q. When was that? A. I couldn't give you the date.

Q. About how many years ago? A. Well, I couldn't tell, because it went out of my mind.

Q. Five years ago? A. Yes, more than five.

Q. Ten years ago? A. Well, it was shortly before the New York City settled with the factories; I couldn't give the date.

Q. But it is more than five years ago? A. Oh, yes.

Q. What season of the year, could you tell that? A. I think it was along in August, if I ain't mistaken; I wouldn't say positive, but I think it was.

Q. From your acquaintance in the past with the East 380
and West Branches of the Byram river, which had the best flow of water, the largest and most constant flow of water? A. Well, take it on an average, I should judge that there wasn't a great deal of difference, the year round, at the time that I worked at Mr. Wilcox's, when I had a chance to see the river; there wasn't a great deal of difference in the two streams, because they were leading from Byram Pond then; take it on an average I don't think there was much difference in the two streams.

Q. Because they were doing what? A. They were using the water from Byram Pond all the time I was working there.

Q. Who was using it? A. The factories; Mr. 381
Wilcox.

Q. Tell me how they used it?

Objected to on the ground that the use of the water by the factories is immaterial here, there being no factory on the property in question, and there being no vested rights in the head waters of the Byram river or the reservoir in question.

Q. What became of the water after they used it? A. Well, it went down the stream to the rest of the factories, and flowed into Long Island Sound.

382 *Q.* Come on down the Byram river? *A.* Yes, sir.

Q. Now, take the section of country north of Mr. Pine's land, up to the dam which the City has built, and state what you can of streams or brooks or springs which flow into the Byram river, and the West Branch of the Byram river; how many do you know of? *A.* Well, there isn't any that flows in that I know of in the summer time, unless it is wet weather; they dry up; there are only small little streams that run in; they dry up when it comes warm weather.

Cross-examined by Mr. DYKMAN:

Q. Mr. Vail, when you say you are an engineer, you
383 mean to say that you are the engineer at the present mill on the Pine property running the steam-engine? *A.* Yes, sir.

Q. How long have you been there? *A.* Three years.

Q. That mill has been constantly running? *A.* Not every day.

Q. Well, been running when you had work to do? *A.* Yes, sir.

Q. Is that mill run by the waters of the Byram river? *A.* The boiler is supplied——

Q. Is the mill itself? *A.* No, sir; it is run by steam.

Q. Is it not a fact that the sole use that you make of the waters of the Byram river is feeding the boilers?
384 *A.* Yes, sir.

Q. How large is the pipe running from the Byram river to the boilers or to the pump that furnishes it? *A.* One and a half inches.

Q. It has been testified to here by some witness on behalf of Mr. Pine that there has always been water enough to supply the boilers; is that correct? *A.* Well, it has so far.

Q. I mean up to the present time? *A.* Yes, sir.

Q. Now, when you say that they were drawing the

waters from Byram Pond, is it or is it not a fact that you mean that the mill-owners who controlled the reservoir were drawing water in a dry season to operate their mills—Russell, Birdsall & Ward, Tingue, House & Co., and the other persons? *A.* Yes, sir. 385

Q. Including the man in whose employ you were, Mr. Wilcox? *A.* Yes, sir.

Q. Did you know this river before Mr. Wilcox and those other gentlemen purchased their rights, in 1864? *A.* No, sir; before? Oh, yes.

Q. 1864; before that? *A.* Yes, sir.

Q. Then before that dam was built you were only dependent, were you not, upon the natural flow of the stream? *A.* Well, I wasn't working there at that time; not at that time; not until after they built the dam. 386

SAMUEL VAIL.

Subscribed before me }
March 20, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

Complainants' counsel reads in evidence the following Connecticut statutes: "An Act to encourage the erection and support of water-power manufactories," chapter 26, Public Acts of Connecticut, 1863 and 1864; approved July 6, 1864. Also, "General Statutes of Connecticut, 1875," chapters 472, 473, 474; "General Statutes of Connecticut, 1880," chapter 92. Also, "General Statutes of Connecticut, 1875," chapter 234, section 18. Also, "General Statutes of Connecticut, Revision of 1887," in force January 1, 1888, sections 1216 to 1225 and section 2687. 387

Objected to by Mr. Dykman as incompetent, improper and immaterial, and that if they are general statutes they may be considered by counsel on either side at any stage of the proceedings and are not here necessary.

It is stipulated that if Mr. Lawrence B. Jenckes, of Stamford, Conn., a witness heretofore called in this

388 proceeding, were recalled, he would testify that he assumed the average flow of 24,000,000 gallons per day or 1,000,000 gallons per hour, and that power would only be used for ten hours a day, as in ordinary manufacturing, and that sufficient pondage could be obtained to maintain a flow of 1,000,000 gallons per hour for ten hours, or 10,000,000 gallons per day.

This testimony is objected to by Mr. Dykman on the ground that the plaintiffs in this action do not own any land to form a dam or pond; that the lands in question cannot be joined for the purposes of this action, and that no power whatever exists on the property of either of the plaintiffs.

389

Complainants' testimony closed, with the right reserved to complainants to recall Mr. George W. Birdsall.

Adjourned to November 16, 1899, at 1.30 P. M.

NEW YORK, December 21, 1899.

Met pursuant to adjournment.

Present—Mr. RENWICK, the Examiner; Mr. MARSHALL
390 and Mr. WILLIAMS, for plaintiffs; Mr. DYKMAN, for defendants.

Defendants' counsel move to dismiss the complaint and all the proceedings taken thereunder, on the ground that there is an improper joinder of parties, and on the further ground that no damage whatever has been proven; on the further ground that the plaintiff has not proven irreparable damages, and that the City of New York is adequately responsible and able to pay any monetary damages.

SAMUEL PINE, recalled by defendants' counsel:

By Mr. DYKMAN:

Q. Mr. Pine, when did you buy this farm? *A.* Father bought it in 1870.

Q. Do you know what he paid for it? *A.* $13,000, I think; he might have paid $13,500.

Q. How many acres are there in the farm? *A.* Something over 100; I think 102.

Q. What proportion of this farm do you cultivate—do you work? *A.* Well, I generally work about—different years different amounts.

Q. Well, as a rule what proportion do you work? *A.* Well, we generally raise about two to three acres of potatoes; about seven or eight acres of corn; that is our average.

Q. Then as a rule you cultivate from ten to fifteen acres each year out of the 100? *A.* I think that would be an average.

Q. How many head of stock do you keep there? *A.* Well, at present we have got four cows, pair of oxen and I think seven horses.

Q. And that is about the average amount of stock you keep? *A.* We do at present; since we opened the quarry we have cut down our cattle stock.

Q. When did you open the quarry? *A.* About five years ago, I think.

Q. From what source do you get the water for these cattle in the winter, for the horses and the oxen? *A.* From a brook behind the barn, a little brook behind the barn.

Q. Not from the Byram river in the winter? *A.* Not from the Byram river in the winter.

Q. You use the Byram river for what purpose? *A.* For the mill and summer pasture, and house purposes.

Q. You use it for the mill? You mean to say, to supply the boiler with water? *A.* To supply the boiler with water.

394 *Q.* And not to run the mill? *A.* Well, the boiler is to run the mill, I suppose.

Q. The mill is not run by water-power, it is run by steam? *A.* It is run by steam, yes.

Q. And you have a canal leading from the river to a cistern and from that cistern you draw the water for the boiler? *A.* Yes.

Q. How much water do you use a day there for that purpose? *A.* I can't answer that; I have heard the engineer——

Q. I don't care what you heard, but as a rule how many hours a day do you run that mill, or have you for the last five years? *A.* Well, when we run by the day, I think they run ten hours; sometimes overtime
395 and sometimes not; I think they close some days at half-past five and some days it is later.

Q. Well, ten to twelve hours a day—you run from ten to twelve hours a day? *A.* From ten to twelve hours; sometimes they run all night.

Q. You opened it when, in 1894 or 1895? *A.* I can't tell you without the books.

Q. Well, the Byram river is the only source of supply for water for this boiler? *A.* Yes.

Q. And you have always had water enough for that boiler? *A.* Always had water enough.

Q. Do you own one or two sides of the Byram river? *A.* One.

Q. There is a dam below your property, is there not,
396 owned by Reynolds—a mill or factory of some kind? *A.* Yes.

Q. Have you no interest in that? *A.* No.

SAMUEL PINE.

Subscribed before me }
March 20, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

FREDERICK MULLER, recalled by defendant's counsel: 397

By Mr. DYKMAN:

Q. For what purpose do you use the waters of the Byram river on your farm? *A.* For my cattle.

Q. How many cattle do you keep? *A.* I keep twelve head of horned cattle, two of horses.

Q. And they go to this brook and drink? *A.* Yes.

Q. And always have? *A.* Yes.

Q. The brook is accessible from the fields? *A.* Yes, sir.

Q. And there has always been water enough in that river to water those cattle, has there not? *A.* So far, yes sir.

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FREDERICK MULLER.

Subscribed before me
March 20, 1900.

JAMES A. RENWICK.

FRED. K. BETTS, called as a witness for the defendant, being first duly sworn, testified:

Direct examination:

By Mr. DYKMAN:

Q. Where do you live? *A.* At Kensico Station.

Q. What is your occupation? *A.* Civil engineer. 399

Q. Do you hold any official position in the government of this City? *A.* I am assistant engineer of the Department of Water Supply.

Q. Stationed where? *A.* Kensico.

Q. How far is that from the Byram river? *A.* It is about two and one-half miles in a direct line.

Q. Are you acquainted with the Byram river? *A.* I am.

Q. Have you made surveys of it? *A.* I have.

Q. You know it, do you not, from its source to its mouth? *A.* Perfectly familiar with it.

400 *Q.* Have you driven along it? *A.* Yes, and walked along it.

Q. The City of New York has built a dam, within the State of New York, have they not, on the Byram river? *A.* Yes, sir.

Q. On which branch? *A.* On what is known as the West Branch.

Q. Are you acquainted, generally speaking, with the East Branch? *A.* Not so well; only at its mouth, where it empties into the main stream.

Q. Were any gaugings ever kept of the flow of the Byram river by the City of New York, by you or in your department? *A.* I kept the flow there for one summer, at the point where the dam is located, above
401 the State line.

Q. That would include at the West Branch only? *A.* The West Branch only.

Q. Do you know the drainage area of the East Branch above the Pine property and the drainage area of the West Branch below your dam? *A.* Not by actual survey, but by measurement on the maps published by the Geological survey of the United States Government it measured 18.22 square miles.

Q. Referring now to the gaugings of the stream of the West Branch of the Byram river, during what months of 1895 were the gaugings taken? *A.* I think from June until December.

Q. Do you or do you not keep in your official capac-
402 ity a rain gauge of the Kensico Dam showing the rainfall? *A.* We do; have for twenty years.

Q. Can you tell me whether the summer of 1895 was what we call a dry summer or wet summer? *A.* It was a dry summer.

Q. Beyond the average? *A.* There have only been two drier summers in sixteen years, including the present.

Q. Look at the paper I now show you and see if it was made by you, under your direction? *A.* Yes, sir; I prepared this paper.

Q. What does it show? *A.* It shows the gaugings

of the Byram river during the months of August, September and October, 1895. 403

Q. What was the average daily flow of the river during those months, approximately? *A.* During August the average daily flow per square mile was 121,127 gallons; during the month of September the daily flow per square mile was 145,055 gallons; during the month of October the mean daily flow per square mile was 257,719 gallons.

Q. Then the average daily flow would be something over 1,000,000 gallons per day? *A.* Not per square mile; for the 18.22 square miles it would average over 1,000,000 gallons a day.

Q. You know the Pine property, do you not? *A.* I do. 404

Q. Have you ever been on it? *A.* I have.

Q. Seen the feldspar mill? *A.* I have been in the mill.

Q. Seen the boiler? *A.* Yes; although I don't recall it to mind; I remember looking at it.

Q. Now, referring to 1895 as being one of the driest years that we have had in the last sixteen years, how many days were there during the entire summer of 1895 when the flow of water in the Byram river above the Pine property was less than 1,000,000 gallons a day? *A.* There were just ten days.

Q. Now, for those ten driest days of these two driest years, what was the flow? *A.* (Referring to paper).

Mr. MARSHALL—What paper is this that he is using? 405

Mr. DYKMAN—Just a memorandum of figures he has taken.

A. The very least flow recorded for any day, and that for one day only, was 462,296 gallons.

Mr. MARSHALL—And that was when?

The WITNESS—In the month of September.

Q. What was the rainfall for the month of August, 1895? *A.* (Referring to paper) 2.91 inches.

406 *Q.* What was the average rainfall per year in that section? *A.* The average rainfall, based on sixteen years' observation, is 47.93 inches per year.

Q. Nearly 4 inches a month? *A.* 3.99; nearly 4 inches.

Q. Now, how many inches of rainfall were there in September, 1895? *A.* 1.65.

Q. And in October? *A.* 4.09.

Q. Then it was during September, 1895, when there was less than 1¾ inches of rainfall you had this severe dry day? *A.* Yes.

Mr. Dykman offers in evidence paper used by witness, and it is marked "Defendant's Exhibit, Betts' Memorandum."

407 *Q.* When was this water diverted by the City; when was this dam built, Mr. Betts? *A.* I think in 1896; when these gaugings were taken in 1895 we were excavating for the reservoir there, and I think it was completed the next year, although I am not positive as to the exact date.

Q. How many square miles of drainage area are there diverted by the dam? *A.* 8.66 square miles.

Q. The gaugings were taken at that point in the West Branch of the Byram river? *A.* Yes.

Q. And the flow as shown by the paper is the flow from the drainage area of 8.66 square miles? *A.* It is.

Q. And when you testified to the amount of flow in
408 the river, you took that as your basis and the other data was the 18.22 square miles which Pine has the benefit of? *A.* That is correct.

Cross-examined by Mr. MARSHALL:

Q. Mr. Betts, you testified, as I understood you, that there was a certain day in September, 1895, that you fixed upon the lowest flow? *A.* Yes, sir.

Q. And what was that flow; how many gallons? *A.* (Referring to paper) 462,296.

Q. Will you show me those figures on that paper

(indicating Defendant's Exhibit, Betts' Memorandum)? 409
A. They are not there.

Q. Now, from what do you get those figures? *A.* From using the number of gallons per square mile, as measured on the area diverted, and multiplying it by 18.22, the remaining area.

Q. Now, where, taking this paper, Defendant's Exhibit, Betts' Memorandum, are the gaugings taken, at what point? *A.* At the point where the dam was built, above the State line.

Q. And near the State line? *A.* About five hundred feet above it.

Q. Is there more than one dam there? *A.* Only one near there.

Q. And this gauging under the heading "Amounts 410
Measured" shows what? *A.* Shows the amount that was measured over the weir established at that point.

Q. And was the entire flow of the Byram river to what extent? *A.* For 8.66 square miles.

Q. Being the entire flow for that area which you admit the City has diverted the water, draining into the Byram river? *A.* That is it.

Q. Now, looking at that paper, do I understand you that the gauge showed, for instance, that on the 11th day of September there was a flow of 568,719 gallons? *A.* Yes.

Q. And that on the 13th it fell to 219,732? *A.* Yes.

Q. And on the 15th to 219,732? *A.* Yes.

Q. The rainfall shown on this paper, 2.91, for the 411
month of August, is the average rainfall as averaged by you for that month? *A.* No; it is actually measured; actual rainfall.

Q. For the month? *A.* For the month of August, 1895.

Q. And this rainfall of 1.65 for September is the average rainfall for that month? *A.* No; it is the actual rainfall; measured rainfall.

Q. Have you any record as to what the actual rain-

412 falls were on the various rainy days of those months? *A.* Not with me now; it is obtainable.

Q. Could you identify that paper shown you, Complainants' Exhibit, November 16, 1897, as stating the rainfalls (handing witness paper)? *A.* No, sir.

Q. Could you take the figures of the rainfalls for the days of the month of September, 1895, as stated on this paper, Complainants' Exhibit, November 16, 1897, and see whether the average agrees with the average of your paper? *A.* They are not averages, I take it; they are actual.

Q. Well, see whether the actual figures agree with the figures stated on your paper, Defendant's Exhibit, Betts' Memorandum? *A.* The total for September is
413 1.65 on this paper.

Q. According to Complainants' Exhibit, November 16, 1897? *A.* Yes.

Q. Then they do agree in those results, the two papers? *A.* They seem to for that month.

Q. Now, I call your attention to Complainants' Exhibit, November 16, 1897, to the figures thereon opposite the date September 26, and ask you whether that paper shows a rainfall on that day of .58 of an inch? *A.* Yes, it does.

Q. Now, can you explain why it is that the figure in the next column, on the day following, September 27, shows a lower flow? *A.* Only that it actually measured that.

414 *Q.* Is it possible that it could have measured less after a rainfall of over half an inch? *A.* Yes.

Q. Can you explain how? *A.* Only that it actually did; that is all.

Q. Well, is that reasonable to you? *A.* I don't know whether it is reasonable or not; it is possible.

Q. I ask you as a civil engineer whether, after a rainfall of half an inch on this area surrounding the Byram river it is possible that it would lower in the next twenty-four hours the flow of the river? *A.* It is possible.

Q. And it is also possible that you could have a

rainfall of over half an inch on the 26th without increasing the flow of the Byram river at that point on the 26th over the flow on the 25th? *A.* Yes.

Q. Mr. Betts, I call your attention again to this Complainants' Exhibit, showing a fall of .48 of an inch on the 12th of September, and a flow on that day of 351,571 gallons. *A.* Yes.

Q. I show you on that paper that on the 13th, the day following this rainfall of .48, there was a flow of 219,000 gallons, is that possible? *A.* Yes.

Q. Can you explain to us how or why it is possible? *A.* Because when the country is very dry a slight rainfall of that kind doesn't get into the streams at all; it is simply taken up by the dry surface soil, without affecting the flow of the stream.

Q. I show you again Complainants' Exhibit showing no rainfall and a flow of 284,359 gallons on September 4, and I show you date of September 5, showing a flow of 351,569 gallons; how can you explain that increased flow if there was no rainfall? *A.* About four miles above, on a tributary of that stream, was a mill, which might, perhaps, affect the flow from day to day.

Q. Where is that mill? *A.* That mill is what is known as Sam's Mills, about a mile and a half above Armonck.

Q. And is on the West Branch of the Byram river? *A.* It is on the Wampus river, a tributary of the West Branch of the Byram river.

Q. The Wampus river flowing from Wampus Lake down to the Byram river? *A.* Yes.

Q. I show you Complainants' Exhibit 1, May 5, 1899, and ask you whether that is a map prepared from the United States Geological Survey maps, which you referred to in your testimony? *A.* Yes; that is printed from the same plate, apparently.

Q. You gave a drainage area in your testimony of 18.22 square miles; will you state again what that drainage area is, what it is made up of, in point of locality? *A.* It is made up of the entire area that

418 drains into the Byram river above Samuel Pine's, exclusive of the area diverted by New York City.

Q. And including both the East and West Branches of the Byram river? *A.* Of the East Branch and the West Branch below the point of diversion.

Q. And the area from which you say the waters have been diverted by the City of New York is something over 8 square miles? *A.* 8.66 square miles.

Q. Then is it in your opinion correct that the entire drainage area there was 18.22 plus 8.66? *A.* I think that is reasonably correct.

Q. Now, does this 8.66 square miles lie above the city dam? *A.* Yes.

Q. Now, taking the 18.22 square miles, will you tell
419 me what portion of that you assign to the drainage area of the East Branch? *A.* I haven't separated the two in my calculations of areas at all.

Q. You can do so? *A.* No.

Q. You can't divide that 18.22? *A.* I have no means here of doing it.

Q. Is the 18.22 miles assigned by you entirely to the area drained below the city dam? *A.* It is.

Q. But inclusive of the East Branch? *A.* Yes.

Q. Now, you can't divide that at all between the East Branch and the main branch of the Byram river below the dam? *A.* Not in my mind; I can do it on the map.

Q. Well, look at this map——? *A.* It would take me about half a day to study those contours and locate
420 that line to make that division, and then when I did it I would have to calculate the area in addition.

Q. How far is the Kensico dam from the State dam near the Connecticut line? *A.* What do you mean by the State dam?

Q. I mean the dam built by the City of New York near the State line? *A.* I should think it might be three miles and a half in a straight line.

Q. You testified that the summer of 1895 was a dry summer, and that there were only two drier summers within a certain period of years; what

were those two drier summers? *A.* I don't recall 421
now; I remember looking over it to see how many there were.

Q. Can't you give me your best idea on that point?

Mr. DYKMAN—I object to the witness guessing.

Q. You don't know what those two drier summers then were? *A.* No, sir.

Q. Do you know whether they occurred within ten years? *A.* Well, I think they occurred within three or four years; still I am not positive as to that.

Q. Are you positive they occurred within five years? *A.* Well, I have a list in my pocket, if I can look at that (referring to paper); they were the summers of 1891 and 1892; I said two; that was a fault of mem- 422
ory; there were three.

Q. What was the third? *A.* The third was 1895.

Q. Now, then, down to the present moment, the summers of 1885, 1891, 1892 and 1895 were the driest summers; is that true? *A.* That is true.

Q. Now, Mr. Betts, can't you look at that map and make a rough estimate apportioning that drainage area of 18.22 square miles as between the main Byram river below the city dam and the East Branch?

Mr. DYKMAN—I object to it on the ground it is too remote.

A. I don't think I can give you any definite idea in 423
regard to the matter; it is simply a matter of guess.

Q. Well, I will take your guess.

Mr. DYKMAN—I object to his guess.

Q. Well, give your best estimate. *A.* In order to make an estimate, why I should want to have a half a day to study those contours and trace the line from them.

Q. Well, looking at this map of the U. S. Geological

424 Survey, Comp. Ex. 1, May 5, can you tell me whether the drainage area of the East Branch of the Byram river appears to you to be ten square miles? *A.* Not by looking at that map; there is no watershed line on there; there is a map has it on, but I can't tell from that map.

Q. There are contour lines showing elevations on that map? *A.* Yes; it would be necessary to study those contour lines and locate the watershed.

Q. Then as an engineer you can't tell from that map whether the drainage area of the East Branch is ten miles or not? *A.* Not by just looking at it, without tracing the line.

Q. Now, what map do you refer to that there is here
425 that shows the drainage area? *A.* The map that I sketched the watershed line on.

Q. You haven't produced that map here yet? *A.* No.

Q. You testified in September, 1895, the mean daily flow per square mile was 145,055 gallons?

Mr. DYKMAN—Not per square mile.

Q. You testified to a mean daily flow in September, 1895, of 145,055 gallons?

Mr. DYKMAN—He said that was the product of the 8.66 square miles.

Q. You remember testifying, do you not, to a mean daily flow in September of 145,055? *A.* Not to such
426 a question as that, I didn't testify.

Q. Did you testify to a mean daily flow anywheres in or around the Byram river measured by you or estimated by you of 145,055 gallons? *A.* Yes.

Q. Now, on what day did that take place? *A.* That is the mean daily flow for the month, the mean of the thirty-one days; the total amount for the month, divided by the number of days in the month, giving the mean daily flow.

Q. And that was measured at this dam—that was taking the daily number of gallons from your Kensico dam gauge?

Mr. DYKMAN—No. No. 427

Q. Well, from where; where did you get your daily number of gallons, from which you made this computation of 145,055? *A.* I took the measurements as measured on the weir of the Byram dam, or the Byram Tunnel dam, as we call it; reduced that to a basis of so many gallons per square mile and multiplied that by the 18.22, reducing it to the watershed area above Pine's; and my figures are based on that.

Q. You stated that this City dam was constructed you thought in 1896? *A.* I think it was completed in about 1896.

Q. When was the water there first actually diverted? *A.* I don't remember; I think not for a year later, but still it is only a matter of judgment; I don't know. 428

Q. In your direct examination you referred, as I understood you, to a flow which had been measured or estimated of one million gallons north of Pine's; will you state more fully what you meant by that? *A.* I testified that during those three months—three dry months of the summer of 1895—that there were only ten days during which the flow was less than one million gallons per day on that 18.22 square miles.

Q. That was in 1895? *A.* That was in 1895.

Q. Well, at that time you hadn't diverted the flow from the 8.66 square miles by the erection of the City dam, had you? *A.* No.

Q. How did you get at that one million gallons? *A.* By reducing the flow, as measured at our weir, to the number of gallons per square mile, and multiplying it by the 18.22. 429

By Mr. WILLIAMS:

Q. Then you have no actual means of knowing what was the flow north of Mr. Pine's place? *A.* We have no gaugings at Mr. Pine's place.

Q. And it is merely an assumption on your part that

430 the flow from the 18.22 square miles would be the same proportion as the flow from the 8 square miles? *A.* That is correct, from the 8.66.

Q. You make no allowance for water being held by swamps or flowing more quickly over rocky soil, and so on? *A.* I don't think any allowance should be made, as the character of the watershed——

Q. My question is, you don't make any allowance? *A.* No.

Re-direct examination:

By Mr. DYKMAN:

Q. Should any allowance in your opinion be made for this running over rocks and so forth, mentioned by
431 Mr. Williams? *A.* I think not.

Q. One of these gentlemen asked you whether or not you had diverted any water from this 18.22 square miles at the time of this dry summer; you never have diverted any water as a city from this 18.22 square miles? *A.* Not at that time we hadn't.

By Mr. MARSHALL:

Q. Not at what time? *A.* At the time the gaugings were made.

By Mr. DYKMAN:

Q. Well, have you now? *A.* We are doing it at the present time, yes.

432 *Q.* What area are you diverting? *A.* 8.66 square miles.

Q. What is the area below the dam, down to Pine's? *A.* The area of the East Branch—of all the Byram river above Pine's, exclusive of the diverted area, I measured to be 18.22 square miles.

Q. That is what I asked you; then you are not at the present time and never have been diverting any part of the 18.22 below the dam built by the City? *A.* We have no means of diverting it.

Mr. DYKMAN—That is it exactly.

Re-cross examination: 433

By Mr. MARSHALL:

Q. You were asked a question in respect to allowances either way for flowing through swamp lands or flowing over a rocky or hard surface; as a matter of fact, the fact of swamp lands or hard or rocky surface lands does have an intimate relation to the flow, does it not, in drainage areas? *A.* In the matter of equalizing the flow; in the matter of total amount, I think not.

Q. What equalizes the flow? *A.* The swamp land would equalize the flow without reducing it in the aggregate.

April 2, 1900. 434

FRED. K. BETTS,
By JAMES A. RENWICK,
U. S. Examiner.

NATHAN J. HUGHES, called as a witness for the defendant, being first duly sworn, testified:

Direct examination:

By Mr. DYKMAN:

Q. Mr. Hughes, where do you live? *A.* White Plains.

Q. What is your business? *A.* Pumping engineer for the Village of White Plains. 435

Q. At the White Plains water-works? *A.* Yes, sir.

Q. Do you know where this Pine property is? *A.* Yes.

Q. Have you ever seen it; who took you over there? *A.* I went with Mr. William L. Banks, the gentleman who is here this morning.

Q. Did you see the mill? *A.* Yes.

Q. And the boiler? *A.* Yes, sir.

Q. And went all through it and saw the machinery? *A.* Yes, sir.

Q. And the canal? *A.* Yes, sir.

436 *Q.* And the cistern? *A.* Yes, sir.

Q. What is the capacity of the cistern up to the level of the water in the brook; you can refer to any memorandum you made yourself, any calculation? *A.* 1,700 gallons.

Q. The cistern will hold that up to the level of the water in the brook? *A.* Yes, sir.

Q. How was the water taken from that cistern to feed the boiler? *A.* By an open ditch running directly ——

Q. No, but from the cistern to the boiler? *A.* Oh, a pipe connecting with his feed supply.

Q. There is a canal leading from the river into the cistern? *A.* Yes, sir.

437 *Q.* It has been stated here that this boiler is an 80-horse-power boiler; assuming that statement to be true, how much water would it take to supply it per hour, running under full head? *A.* The estimates I have made, 285 gallons per hour.

April 2, 1900.

NATHAN J. HUGHES,
By JAMES A. RENWICK,
U. S. Examiner.

WILLIAM L. BANKS, called as a witness for the defendant, being first duly sworn, testified:

438 *Direct examination:*

By Mr. DYKMAN:

Q. Mr. Banks, you live where? *A.* I live at present and for twenty-five years past at White Plains, Westchester County, New York.

Q. Where did you live before that? *A.* New Rochelle and Portchester.

Q. Did you ever live in the Town of Northcastle? *A.* I was born in that town, near the boundary line.

Q. You are familiar with what we generally call the Byram valley? *A.* Yes, sir; known it all my life.

Q. Know the farms down there? *A.* Yes, sir.

Q. Have you ever bought and sold any real property? *A.* I have bought and sold for the past twenty-five years real estate of all kinds outside of New York City.

Q. Have you ever been called upon to act as an appraiser of real estate? *A.* I have, for institutions, savings banks and loan associations, County Treasurer, Westchester County, and of the Village of White Plains, New York City, private individuals.

Q. Have you been called upon to value property where loans are to be made? *A.* Yes, sir.

Q. Employed by savings banks for that purpose? *A.* Yes, sir.

Q. Property of all kinds? *A.* All kinds.

Q. Do you know the Pine property? *A.* I do.

Q. And the Muller property? *A.* I do.

Q. How long have you known them generally? *A.* Forty years.

Q. Have you recently examined the Pine property? *A.* I have.

Q. When? *A.* Within two weeks; I examined it several times; the last time within two weeks, within ten days.

Q. Who showed you over the property on your first visit there to qualify yourself? *A.* Mr. Samuel Pine.

Q. What part of the farm did Mr. Samuel Pine show you? *A.* He showed me nearly the whole farm; the part along where the buildings are and along the river more particularly than the other.

Q. Did you go west upon the high ground? *A.* Yes, sir.

Q. What kind of a farm is that, Mr. Banks, as to topographical situation? *A.* It is rather a rough farm, not much level land, and part of it along the river; the southerly part of it is rocky or rock cropping out, covered with a thin soil; the northerly part along the bed of the river is more smooth and more productive; the westerly part is hilly, sloping to the east, most of it; there is some good land on the westerly part of it.

442 *Q.* Can you fix the days when you were there, any one or two days prior to the recent storm in our section? *A.* As to the day of the month? I don't know as I can, then.

Q. Were you there two weeks ago Sunday? *A.* Yes.

Q. You were there on December 3, two weeks ago Sunday? *A.* I suppose that is the 3d.

Q. I was there with you? *A.* Yes, sir; and I was there about a week after.

Q. Well, did you notice the Byram river when you were there December 3d? *A.* I did.

Q. What condition did you find it as to supply of water? *A.* Well, I found the water running over a bed
443 about twenty feet in width, on an average; the river varies from twenty to twenty-five feet in width, and the water was running over a bed of about twenty feet in width and an average—in some places it is stony bottom, it flows more swiftly and not so deep—but an average in the neighborhood of six inches.

Q. You have had some experience with farming? *A.* I have.

Q. And the requirements of cattle? *A.* I have; I was born and brought up on a farm and lived there until I was twenty-five years old, about, and I own a farm now; did own one in Connecticut in this same town.

Q. Was there water enough there on December 3d
444 for the uses of that farm? *A.* Yes, sir; plenty.

Q. From your general experience, covering a period of thirty or forty years, and from your examination of this farm, what, in your opinion, was its market value? *A.* I would consider that farm worth now—its market value—$10,000.

Q. What effect on the value of that farm, if any, has the taking away of portions of the head waters of the Byram river had? *A.* It has not decreased its value in my judgment at all.

Q. Now, coming to the Muller property, above; have 445
you examined that property? *A.* I did.

Q. Do you know where the East Branch of the Byram river intersects the West Branch? *A.* They intersect just at the northerly edge of Mr. Muller's farm.

Q. What sort of a farm is Muller's? *A.* His farm, the easterly portion of it, is a smooth bottom land along the valley of the Byram river; he owns on both sides of the river; the westerly part of it is meadow, and more hilly, and some rock; the house stands back from the road and a lane leads up to it; the buildings are in fair condition; there is a good orchard at the northerly part; a very good small farm.

Q. What is the quality of the land between the road and where the buildings stand? *A.* It is a bottom, 446
meadow land along the side of the river.

Q. Now, when you were there on December 3, did you notice whether or not there was any water in the West Branch of the Byram river? *A.* Yes, sir; there was.

Q. Entirely separate and disconnected from the East Branch at the point where you made your observations? *A.* Yes, sir.

Q. That water was flowing in the old bed of the West Branch of the Byram river then? *A.* Yes, sir.

Q. What in your opinion is the value of the Muller property? *A.* The Muller property is worth from $5,000 to $6,000; not to exceed $6,000.

Q. What effect, if any, on the market value of that 447
property has the diversion of the head waters of the Byram caused? *A.* It doesn't affect its value; there is sufficient water for all purposes in the river, and in the little stream that runs through it into the river also.

Q. Well, eliminate that stream entirely? *A.* There is sufficient water there for all purposes.

Q. How far from the point where the West Branch intersects the East Branch were you when you made your observations, when you state there was water in

448 the West Branch of the Byram river? *A.* Well, I observed it—the West Branch is the northerly boundary of part of Mr. Muller's farm; I think it leaves the East Branch and runs westerly for several hundred feet before it leaves his farm, and then I have been up it and across the bridge over the West Branch; several places I observed it.

Q. And there was water flowing there? *A.* Yes.

Q. Freely or sluggishly? *A.* Flowing at about the same rate as the East Branch and about half the quantity of the East Branch.

Cross-examined by Mr. MARSHALL:

Q. Mr. Banks, how long have you been engaged in
449 this real estate business? *A.* Well, twenty-five years; I don't recollect the first, but it is certainly twenty-five years that I have been engaged in the real estate business.

Q. Have you ever been engaged in any other business? *A.* I was engaged in the hotel business prior to that.

Q. When did you give that up? *A.* Well, I don't recollect the year; 1877 or 1878, I think, about.

Q. Have you ever done any other business within this twenty-five years than this business of handling real estate? *A.* Examining titles, making abstracts and loans, that is in relation to real estate; I was in the Sheriff's office in Westchester County for six years;
450 I think 1877, 1888 and 1889 I was connected with the Register's office also.

Q. Are you a lawyer? *A.* No, sir.

Q. Have you been familiar with this Pine property for forty years? *A.* I have known it in a general way for forty years.

Q. How many times have you been there in forty years? *A.* I have been by it every year, and two or three times a year, but had no occasion to go upon the farm; I was upon the farm some years ago, at the house.

Q. How many matters have you acted in, in the

way of selling land or mortgaging land, in the Byram valley, in the neighborhood of the Pine farm? *A.* Well, just in the neighborhood of the Pine farm, I don't recollect now; in the Village of Portchester—— 451

Q. No; I asked you to confine it to the neighborhood of the Pine farm; now, take the Muller farm? *A.* Well, that is near the Pine farm.

Q. Now, going north of the Pine and Muller farms, towards the State line, how many real estate transactions there have you been cognizant of? *A.* Well, several on King street.

Q. How far is King street from Mr. Pine's farm, in an air line? *A.* About a mile.

Q. What transactions did you handle on King street? *A.* Well, I was familiar with transactions; my cousin, I had something to do with his buying a farm on King street, called the Field farm; that is further north. 452

Q. How much further north? *A.* Five or six miles.

Q. Have you anything nearer to the Pine property on King street? *A.* I don't recollect now, just in that immediate vicinity; I owned a farm in the same town, but further north.

Q. What is the character of the improvements along King street? *A.* As fine as there is in the world.

Q. They are not farms along King street, are they, in the common acceptance of that term? *A.* Well, they are more residences for country gentlemen.

Q. Are the residences extensive and spacious? *A.* Some of them very, and there are some farms. 453

Q. What is the value of land per acre on King street, take it about the point nearest to Mr. Pine's land?

Objected to by defendant's counsel as incompetent, irrelevant and immaterial.

A. Including buildings?

Q. No; I will take the land without buildings? *A.* Well; now, it varies; from $200 to $500 an acre.

Q. Is that the highest value that you have known to have been paid on King street for land? *A.* Yes, sir; $500 an acre without buildings.

454 *Q.* Do you know actually of any sales of farms in the valley of the Byram river, starting from Portchester and going north to the State line? *A.* Yes, sir.

Q. How many? *A.* Well, I can't recall now the exact number; I know half a dozen, probably.

Q. Name the transactions; designate them by the name of the owner? *A.* Well, there is one farm that a woman by the name of Husted bought; I examined the title.

Q. Where does that lie? *A.* That is on the easterly side of the Byram river.

Q. What did you have to do with that? *A.* I had to examine the title, and consulted her in regard to the amount to pay for it; and there is another farm nearly
455 opposite, called the Dayton farm.

Q. Nearly opposite the Husted farm? *A.* Yes, in that locality.

Q. How far are they above Mr. Pine's? *A.* Well, they are just on the edge of the State of New York.

Q. Way up by the State line? *A.* Yes; it is in the valley of the Byram.

Q. That is how many miles from Mr. Pine? *A.* Six or seven miles.

Q. Have you any farm lands lying nearer to Mr. Pine than those in your mind? *A.* Well, not that I have personal——

Q. Now, in valuing Mr. Pine's land, as I understood you, at $10,000—— *A.* Yes.

456 *Q.* ——tell me what makes up the $10,000; there is land there and there are buildings? *A.* There is about one hundred acres of land; I don't know by exact measurement, but about one hundred and three or one hundred and four, perhaps, and upon that land there is a house, very old, a carriage-house or stable and a workhouse—sort of a workhouse—north of the house, and a barn back in the fields, half-way through the farm, and a mill for

grinding stone; those are about all the buildings; the buildings are old and in poor condition; the house is over one hundred years old, old Revolutionary house. 457

Q. So that you find most of your value there in the land? *A.* In the land.

Q. Bringing the land about $100 an acre? *A.* The land with the buildings and improvements would be worth about $100 per acre.

Q. Is that about the value of farming land in that section? *A.* You can buy the best farms in that section, where the value is for farming purposes, for $100 an acre.

Q. What would be its value for building sites? *A.* It has no value for building sites.

Q. So that you have valued Mr. Pine's farm only for farming purposes? *A.* Yes; it isn't suitable for building sites. 458

Q. Now, why is it not suitable for building sites? *A.* Because it is situated on low ground and that it is not desirable—and particularly along the banks of a stream—is not desirable for a residential purpose.

Q. What is the height of the elevation of the hills along the Byram river embraced in Mr. Pine's farm? *A.* Above what, the river?

Q. Above the river? *A.* Fifty feet.

Q. Are you willing to say that there is no hill on Mr. Pine's farm more than fifty feet? *A.* Well, I don't think there is; still up in the northwesterly corner there might be a point up there on the boundary line of his land that might be a little higher than that, but I don't think there is. 459

Q. Then you are willing to base your estimate of values on that fact, that there is no hill on Mr. Pine's farm that is over fifty feet high above the river? *A* Well, that is my judgment.

Q. And you valued the farm, having in mind that the elevation above the line of the stream was fifty feet? *A.* I had in mind that it was not calculated for building purposes.

Question repeated.

A. Well, I don't know as I went over the farm that I

460 calculated in my mind or estimated the highest point of his land above the river; I don't think I did.

Q. Won't you please answer that question? (Repeated.) *A.* Yes.

Q. Then if the elevations there are more than fifty feet, it would be valuable for residential purposes; is that what you thought? *A.* Well, that would depend upon how much there was of fifty feet, whether there was room enough for a residential site.

Q. Now, I take it, from what you have testified, that you think people do not desire a stream through residential tracts of land; is that your opinion, as a real estate expert, that people generally do not desire a stream? *A.* That kind of a stream.

461 *Q.* What do you mean by "that kind of a stream?" *A.* One that is not navigable, one that you can't use boats on.

Q. Then, as a real estate expert, is it your opinion that people purchasing tracts for residential estates do not desire running, flowing streams of water through them, that they prefer a tract without a flowing stream to a tract with a flowing stream? *A.* Well, that depends somewhat——

Question repeated.

A. Well, they prefer a tract with high ground.

Q. I must ask for an answer to the question, Mr. Banks? *A.* I have in mind this stream more particu-

462 larly.

Q. I asked what was the matter with that stream, and you say it is not navigable. *A.* I say it is not desirable along that stream for residential purposes.

Q. Why not? *A.* It is low, wet land, and with a fog at nights, and people are afraid of malaria and dampness, and it is not desirable; can't sell a man a building lot——

Q. (Repeated) Then, as a real estate expert, is it your opinion that people purchasing tracts for residential estates do not desire running, flowing streams of water through them, that they prefer a tract without a

flowing stream to a tract with a flowing stream? *A.* 463
Well, I think they prefer a tract without a stream of water.

Q. Now, how many times in your experience have you known a case where a gentleman purchasing a country estate has sought one without a flowing stream, and made that a specification? *A.* Well, I know that generally——

Q. No; but how many times in your experience? *A.* As to the number of times, I don't know the number of times; I say generally.

Q. Do you know of any instance in the country where a gentleman purchasing an estate of some acres for his residence will not take it with a running stream upon it? *A.* He might purchase it with a running 464
stream upon it——

Q. Well, do you know of any such case? *A.* Yes, I know of several cases where a person having a running stream will use that stream for water purposes, but not to build a house upon.

Q. Did you ever know of an estate where a stream was sought for purposes of ornament? *A.* Yes.

Q. Then running streams do have value in the minds of purchasers? *A.* Well, an imaginary value.

Q. Then you know more about it than the purchasers? *A.* Well, I have seen the folly of their ways often; spend a great deal of money to give it away afterwards.

Q. So you don't believe in the improvement of coun- 465
try estates? *A.* Well, men spend their money sometimes on them, but it isn't profitable.

Q. But, however, there is a demand for country estates? *A.* Yes, sir.

Q. You mentioned swamp land on Mr. Pine's farm; now, will you please locate it? *A.* Well, I mentioned the northerly part of his farm along the river was more level and not so stony or hilly as the southerly.

Q. Then you didn't mean to refer to it as swampy? *A.* In the southerly part is a marshy spot, and then in

466 the middle or westerly side there is another marshy spot, and a little stream of running water comes out of it.

Q. What is the entire area of that part of Mr. Pine's farm that is too swampy to be used for cultivation? *A.* Well, I don't think there is any of it that is too swampy to be used for cultivation in a farm, for a pasture or mowing.

Q. Did you observe that his entire farm lies above the level of the river? *A.* Yes.

Q. None of it below the level? *A.* Above the level.

Q. Now, you state that you have valued that tract of land as a tract for farming purposes; you didn't take into consideration any other value than that, did you?

467 *A.* No; I didn't consider it would have any other value, except what there is upon the farm.

Q. And that you stated to be what, these buildings? *A.* These buildings; yes, sir.

Q. Anything more? *A.* I think I have stated all.

Q. Well, don't you know, Mr. Banks? *A.* I know the farm; I know what there is on it.

Q. You have stated to me all the elements of value that you found there upon which you place this figure of $10,000? *A.* Well, I think so; I am not sure.

Q. Well, won't you mention any you haven't stated? *A.* I mentioned the buildings and the land; there is an orchard, an old orchard, south of the house, southwest, and the mill for grinding stone, which is taken

468 from this land; some woodland; I think I mentioned everything.

Q. Now, what value did you place on the feldspar deposits in Mr. Pine's land; you placed none, did you? *A.* Well, no; I think——

Q. I don't want that? *A.* I didn't place any specific value; I have had some experience in that.

Q. You stated that Mr. Pine's house was old; did you find the other buildings old? *A.* They are gen-

erally old; the mill, I think, is the most recent build- 469
ing.

Q. About how old is the mill? *A.* Well, I think the mill had been built six or seven years.

Q. And how about the barns; how old would you say they were? *A.* The barn back in the fields is quite old.

Q. Well, how old? *A.* Fifteen years, or twenty years; but the building west of the carriage house, or stable, isn't so old; perhaps seven or eight years; they are not in very good repair.

Q. In valuing Mr. Pine's farm, did you add anything at all for the flowing of this stream through it? *A.* Well, I took into consideration that it was a farm well watered. 470

Q. You added value because of that? *A.* Yes; if there had been no water upon the farm, it would have been worth less.

Q. If there had been more water on the farm, would you have given a larger value to it? *A.* No; I think there is too much now sometimes.

Q. Whereabouts? *A.* At the upper part of the farm; I think in time of freshets, I think that the stream overflows and makes some of the land too wet.

Q. So that your impression is that the Byram river, as you saw it flowing through Mr. Pine's land, is of more advantage to his farm than if there had been an addition to the quantity of the water as you saw it; is that your opinion? *A.* I think that it doesn't affect 471
the value of that farm.

Q. Now, you visited this farm on December 3 and again on December 10, did you not? *A.* I think those were the dates.

Q. How deep did you see the water in the channel of the river, in front of Mr. Pine's land? *A.* In front of Mr. Pine's house it runs swiftly; at the northerly end of his farm and the southerly end of his farm, it is deeper.

Q. How deep is it? *A.* Some places a foot; some places 6 inches.

472 *Q.* In observing the channel of that river, you could distinctly see the channel of the river? *A.* Yes, sir.

Q. You saw the stones? *A.* Yes, sir.

Q. They were not covered? *A.* Not all of them.

Q. Now, if there had been a current of water flowing through there covering those stones and everything to the full extent of the ordinary channel of that river, would not the value of Mr. Pine's farm in your opinion be increased? *A.* I don't think so; I think there is sufficient water for all necessary purposes.

Q. And in your opinion as a real estate expert that would be the opinion of a gentleman purchasing that for the purpose of a residential estate? *A.* I think so.

Q. Now, you spoke of there being some consideration
473 of malaria in regard to streams? *A.* Yes.

Q. Does that in your opinion apply to flowing streams? *A.* Yes.

Q. Does it apply rather to streams that move with a slow current, than with a fast current? *A.* It is not so prevalent with a swift-running stream.

Q. So the swifter the stream runs the better from that point of view? *A.* Yes.

Q. The diminution of the flow of water in a stream retards the current, does it not? *A.* Well, no——

Q. I want an answer to the question?

Mr. Dykman—He is answering it.

474 *A.* Perhaps I didn't understand it.

Q. (Repeated) The diminution of the flow of water in a stream retards the current, does it not? *A.* The diminution? That is the less amount flowing retards the current? Well, I don't know that it does.

Q. Well, would the greater or less quantity flowing down the channel of a river have any effect on these hypothetical malarial conditions? *A.* Well, the less quantity flowing would be less liable to produce malaria.

Q. Now, take it where there are ponds along the river, 475
does the greater or less flow of the water have any effect on the supposed malarial condition? *A.* If the water is ponded——

Q. Won't you answer that; the question calls for only yes or no?

Mr. Dykman—The counsel for the City objects to the constant interference of the complainants' counsel with the answers of the witness.

A. Well, I think it does.

Q. Well, what effect? *A.* If the ponds are standing and there isn't water flowing it is worse.

Q. The less water that flows the more the pond might 476
approach to a condition of stagnation? *A.* Yes.

Q. You noticed a pond on Mr. Pine's land, did you not?

Objected to by defendant's counsel on the ground that it is admitted by the complainants' counsel that there is no pond on the Pine property.

Q. You noticed a pond lying along the edge of Mr. Pine's land, did you not, near his house? *A.* The lower end of his farm, yes.

Q. Then it is true, in your opinion, is it not, that if the City has diminished to a considerable extent the flow of water down the Byram river it has increased the chances of stagnation in regard to that pond? *A.* No. 477

Q. It has not? *A.* There is enough water to fill the pond all the while.

Q. And the pond wouldn't be improved by having more water flowing through it and over its dam? *A.* I think not in that case.

Q. If prior to the diversion of the waters of the Byram river by the City of New York, there was an average of five to seven millions of gallons more per day--and there was a decrease in the flow there from five to seven million gallons per day, you think that

478 Mr. Pine's property is improved by that decrease in the flow of water?

Objected to by defendant's counsel as a statement and not a question.

A. I don't think it is improved by any such state of facts; that is, if that statement is correct; I don't know about that.

Q. Well, I ask you only to assume that if the City of New York has taken a flow of water from the Byram river, amounting to 7,000,000 gallons, which prior to its diversion by the City flowed down past Mr. Pine's property, is Mr. Pine's property damaged or not thereby? *A.* In my judgment his property has not
479 been damaged by reason of the taking of what water has been taken; it has not been increased, however.

Mr. MARSHALL—I ask for an answer to the question.

Mr. DYKMAN—I object; it has been answered.

Question repeated.

A. If I could state, without going on the record, if this 7,000,000 gallons that is taken might take every drop of water that runs in the river, then the farm would be damaged.

Q. You saw the Byram river when you were there? *A.* Yes.

Q. You saw the flow? *A.* Yes, sir.

Q. Could you tell what that flow was in gallons per
480 day? *A.* I could not.

Q. You hadn't any idea? *A.* No; I might have an idea, but I wouldn't want to stake much on my judgment of it; I could tell the flow of the river, but not the number of gallons.

Q. Assume, Mr. Banks, that before the diversion of this water by the City of New York the average flow through the year was 24,000,000 gallons per day, down the Byram river—— *A.* Both branches?

Q. I am speaking of the Byram river, in front of Mr. Pine's property—assuming it was 24,000,000 gallons, and that the City has diverted 7,000,000 or

8,000,000 gallons—one-third of it—is Mr. Pine's property affected in value thereby? *A.* No, sir. 48

Q. For any purpose? *A.* Not for any purpose that I know of at present; or for the future, that I can conceive.

Q. Assuming that the conditions of Mr. Pine's property permit of his constructing a mill pond upon it, would the diversion of this water have any effect then?

Objected to by defendant's counsel on the ground that Mr. Pine at no point owns both sides of the river, the question is a mathematical impossibility.

No answer.

482

Q. What value did you give to Mr. Pine's land in view of the possibility of constructing a mill pond there and securing water power? *A.* I didn't consider that it was feasible or could be done.

Q. Then if it were feasible, it would make a difference in your value, wouldn't it?

Objected to by defendant's counsel on the ground that it is impossible, not feasible.

A. If it were possible to make a pond to store water there, it would increase the value of this property, in my judgment.

Q. And then in that case, if it were possible to make 483
a pond there, the decrease in the flow of the water would be a loss and damage to Mr. Pine as a land owner, would it not? *A.* Oh, this quantity of water that is diverted I don't think affects it at all——

Q. That isn't the question—— *A.* I can't realize how it is possible.

Q. (Repeated.) Then in that case, if it were possible to make a pond there, the decrease in the flow of the water would be a loss and damage to Mr. Pine as a land owner, would it not? *A.* Yes.

Q. How do you apportion the value $10,000, between

484 the land and the buildings there? *A.* Well, I can't very well separate one from the other.

Q. As a real estate expert you can't separate unimproved land from improved?

Mr. DYKMAN—I object, on the ground that it has been held that a division of an estimate of that kind is illegal and improper.

Q. Can you, as an expert, apportion your estimate between the improvements and the vacant land?

Mr. DYKMAN—Objected to on the ground that the word "improvements" is too remote; what do you mean?

Mr. MARSHALL—Buildings.

485 Mr. DYKMAN—What buildings?

A. Well, the buildings wouldn't be worth anything, if they had to be sold and taken away; they add to the value of the property, but to separate one from the other, it is impossible to arrive at any just and fair conclusion.

Q. Then as a real estate expert you say that you cannot tell me what proportion of the $10,000 you allow for the value of buildings on Mr. Pine's farm? *A.* No; I can't separate it in dollars and cents.

Q. But a little while ago you told me your idea of the value of land on King street without buildings? *A.* Yes, some land.

Q. Now, why can't you tell me the value of Mr.
486 Pine's land without its buildings? *A.* Well, I might in my judgment—I might form an estimate of what the property would be worth without improvements; about fifty per cent. less.

Q. A while ago you told me your value of farm lands there was $100 per acre? *A.* Including buildings; buildings suitable for a farm.

Q. So that you would allow here about $5,000 for the land and $5,000 for the buildings? *A.* If I had it separate I think the improvements on the farm add about fifty per cent.

Q. Now, you saw that feldspar mill when you were there? *A.* Yes.

Q. You found it in operation? *A.* Yes, sir. 48

Q. What is the cost of that building, can you tell me? *A.* What it did cost?

Q. What you think it would cost to build, as it is there? *A.* The building itself?

Q. Yes. *A.* In its present condition?

Q. What it would cost to build, as you see it there now? *A.* Well, I don't know what it would cost to build.

Q. What it would cost to build? *A.* It has been built a number of years.

Q. How many years? *A.* Perhaps five or six, six or seven; $1,000.

Q. And are you willing to state as a real estate expert that that building could be constructed for $1,000? 48
A. Well, the wear and tear would be something for it.

Q. What could you build the building for as it stands now, a new building? *A.* Well, a new building would be worth twenty-five per cent. more than this one.

Q. That would be $1,250 new? *A.* Yes, sir.

Q. Now, give me the size of that building; you measured it? *A.* Well, I measured it in—not accurately.

Q. What was your idea? *A.* I made a little memorandum, but I can't recollect without referring to it.

Q. Well, was it five feet square, or ten, twenty, thirty or forty; I want the basis of your estimate; you valued it at about $1,250; Now, I want the size? *A.* 489
You are asking me now to separate my estimate——

Q. Well, give me your idea of the size of that building, on which you have testified as to the value of the property? *A.* The main building, which is the westerly part of it—I call that the main building—I think is about thirty by forty; that is a two-story building, with a tar-paper roof; and there is an addition to that, one-story addition, on the westerly end, across the end of it—the front of the building, towards the east or towards the river—runs across the front of the main

490 building and projects beyond; I think that is probably forty feet in length, north and south, and about twenty feet in depth, east and west; joins on in the shape of an L to the other building, the main building; that is a two-story building on one part, the easterly part, and seems to be a story or a story and a half, as we call it, on the west; it isn't all in one building; it is built separately, one part for the machinery—that is the engine and boiler—and another part for the grinding of the stone; then there is a stone crusher outside that is run from a belt to the machinery in this mill.

Q. Is that a building? *A.* No, sir.

Q. I am asking about the building; two buildings? *A.* They join together.

491 *Q.* And you think buildings of that size and the conditions you have described could be built new for about $1,250? *A.* I think so; just a frame shell.

Q. Well, give the height in feet? *A.* Well, perhaps twenty feet.

Q. Do you know how many feet of lumber it would take to construct those buildings? *A.* I do not.

Q. Have you any idea of the mere cost of lumber in those buildings? *A.* I never have had experience in building just such buildings as that; I have built barns and carriage houses and houses of all kinds, but I couldn't tell without calculation.

Re-direct examination:

492 By Mr. DYKMAN:

Q. Speaking again of the Pine property, how close to the road is the river in front of the house? *A.* The nearest point, as I recollect, is about in front of the house, where the bridge crosses over from the road, and it was twenty or twenty-five feet.

Q. You came from the highway over the river on a bridge to get into Mr. Pine's house? *A.* Yes, sir.

Q. Then as you go north from that bridge the road

is close to the river for quite a distance? *A.* Yes, it runs close to the river quite a little distance above. 493

Q. And the river is lower than the highway? *A.* Yes, sir; then as you get a little above, the road leaves the river a little to the east a little further, but nearly parallel with the river up that valley.

Q. Now, your attention has been called to King street property; how does the property in King street compare with property in this valley? *A.* The farms as a rule are better farms; you mean lower King street, near Portchester?

Q. Yes? *A.* Oh, they are worth some of them ten times as much; they are higher and have a view of the Sound; and the upper end of King street, being further from the railroad, is worth less than the lower end. 494

Q. Now, compare the upper end of King street, where you can see the Sound, with this property down in this hollow, how do they compare? *A.* They are more desirable; they are better farms, better land.

Q. So far as residential purposes are concerned? *A.* Better for residential purposes.

Q. Bring more money? *A.* Bring more money than farms along the valley of the Byram river.

Q. They are occupied, a great many of them, by people of means? *A.* Yes, sir.

Q. And handsome places been built? *A.* Yes, sir.

Q. Up on the high ground, where you can see Long Island Sound? *A.* Yes; Whitelaw Reid and Trenor Park, and Walter W. Law's; several farms. 495

Q. And the Brooks' place? *A.* And Marion Story and O'Callaghan, the President of the Mutual Bank.

Re-cross examination:

By Mr. MARSHALL:

Q. I understood you to say that land on King street was worth ten times as much as you had testified to the value of land in this Byram river valley? *A.* Some of it.

Q. As this farming land of Mr. Muller's? *A.* Yes.

496 *Q.* Is that for the land alone? *A.* For the land alone.

Q. Then if you allow $50 per acre in the Pine tract you get a valuation of ten times that on King street? *A.* I priced some last summer for a party on King street, and they wanted $500 an acre for it.

Q. Is the fact that you can see the Sound from these villa sites of advantage to the sites? *A.* Yes.

Q. Why? *A.* It adds to the value to a great extent.

Q. Well, why? *A.* Well, being on high ground overlooking the water and the Sound.

Q. The view? *A.* Yes, sir.

Q. With the incident of water in the view? *A.* Yes.

Q. Do you confine that to the Sound; don't you
497 allow that to other streams or bodies of water? *A.* I might to lakes.

Q. You wouldn't allow it to an inland stream that was in full view from your doorway then? *A.* I wouldn't allow it to a stream such as I have in mind.

Q. I ask for an answer to the question? *A.* I have in mind streams of this character, several of them in my mind; I own a place now near one of them, I find it difficult to sell it on account of the low ground on the stream.

Mr. MARSHALL—I object; you are not answering my question. I move to strike out the answer as not being responsive to the question.

498

Q. (Repeated) You wouldn't allow it to an inland stream that was in full view from your doorway then? *A.* I wouldn't allow it to streams of this character, the character of the Byram river or the Bronx or streams of this character.

Q. Now, Mr. Banks, why would you not allow some element of value to property which commanded a view of a flowing stream, such as you saw the Byram river to be? *A.* Because flowing streams are in low ground invariably; you get no

view from your property; the view of the stream running, perhaps, but it isn't desirable. 499

Q. Then I understand that you, as an expert, say that you do not allow any element of value to property because it commands a view of a flowing stream like the Byram river? *A.* The Byram river doesn't add to its value; no, sir; on the contrary.

WM. L. BANKS.

Subscribed before me
March 30, 1900.

JAMES A. RENWICK,
U. S. Examiner.

Adjourned to Thursday, December 28, 1899, at 10.30 A. M. 500

NEW YORK, January 4, 1900.

Met pursuant to adjournment.

Appearances—Mr. MARSHALL and Mr. WILLIAMS for the plaintiff; Mr. DYKMAN for the defendant.

WILLIAM H. HOYT, called as a witness on behalf of the defendant, was duly sworn, testified as follows:

Direct examination: 501

By Mr. DYKMAN:

Q. Mr. Hoyt, where do you reside? *A.* Tarrytown, New York.

Q. And your occupation is what? *A.* Real estate dealer and agent.

Q. Where is your office? *A.* No. 5 Vanderbilt avenue, in the City of New York.

502 *Q.* Have you any branch office? *A.* Branch office at Tarrytown.

Q. How long have you been engaged in the real estate business? *A.* Thirty-one years.

Q. And during that time have you bought and sold real estate in Westchester County? *A.* I have.

Q. Have you property on your books now for sale in Westchester County? *A.* I have.

Q. And in what other parts of the country north of the Harlem river? *A.* On the line of the New Haven Railroad from New York to New Haven, on the line of the Hudson River road to Albany, on the West Shore road to Kingston and on the Harlem for its entire length.

503 *Q.* How many pieces of property have you now on your books for sale of various kinds, including farm property? *A.* Approximately about four thousand.

Q. At what places in the State of Connecticut have you property for sale? *A.* I have nearly every town on the line of the New Haven road and some of its branches.

Q. And during your experience as a real estate agent have you been called upon to appraise property? *A.* I have.

Q. Have you acted as a real estate expert in condemnation proceedings? *A.* I have.

Q. Do you know the New York and Northern Railroad? *A.* I do.

504 *Q.* Were you connected in any capacity with the condemnation proceeding or the acquisition of the right of way? *A.* Securing the right of way.

Q. On whose behalf? *A.* On behalf of the railroad.

Q. Were you connected with the condemnation proceeding in the Croton Aqueduct, New York? *A.* I was.

Q. As an expert witness? *A.* Yes, sir.

Q. As to value, etc.? *A.* Yes, sir.

Q. On whose behalf? *A.* On behalf of the property-owners.

Q. And you have been employed, have you not, by the City of New York in various cases? *A.* I have.

Q. Do you know the Pine property in question? *A.* I do.

Q. How long have you known that section of the country, generally speaking? *A.* About twenty-five years.

Q. Have you recently made an examination of the Pine property? *A.* I have.

Q. When? *A.* I think it was one day last week, I forget the day that I was specially there.

Q. Who showed you the lines of the property? *A.* Mr. Banks.

Q. Who did you see on the property? *A.* I saw no one except an employee, a man who couldn't understand English; Mr. Pine was not there.

Q. How many acres do you understand that farm contains? *A.* Contain 100 acres. 506

Q. You can use any memorandum you made? *A.* It is supposed to contain, or is reported to contain, 100 acres.

Q. Did you look it over? *A.* I did.

Q. What class of farm is it? *A.* It is an ordinary farm for that section of the country; it is what I regard as a rough farm.

Q. What do you mean by a rough farm? *A.* I mean that the predominant acres of the farm are very rough pasture and woods.

Q. How many sides of the river do you understand Mr. Pine owns? *A.* On one side.

Q. What road front has he? *A.* He has no road front except by right of way over the bridge across the river. 507

Q. You leave his property and go over a bridge to get to the highway? *A.* Yes, sir.

Q. Did you see the Muller property? *A.* I did.

Q. Did you see the point where the West Branch of the Byram meets the East Branch? *A.* I did.

Q. How many acres did you understand there to be in the Muller farm? *A.* 44 acres, so reported.

Q. What class of farm do you term that, sir? *A.* That I regard as a very good farm; principally the majority

508 of the farm is meadow and bottom, also tillable land, about five acres of wood and rough pasture.

Q. Does the Pine farm compare favorably with the average farms throughout that section, the section of Westchester County immediately west of it. *A.* It does not.

Q. You know where King street is, do you not? *A.* I do.

Q. How does it compare with the property immediately west of it on King street? *A.* It is not comparable.

Q. Why not, sir? *A.* Because of the topography of the land, the quality of the land and the class of improvements and the neighborhood generally.

509 *Q.* The street known as King street has been referred to in the trial of this case and property has been said to be held at high prices; how much below King street is the Byram river at this point approximately?

Mr. MARSHALL—I object to that. He is not an expert on grade lines.

A. I should say from seventy-five to one hundred feet.

Q. Is the section of the Byram country, as I term it, near the Pine property improved? *A.* No, sir.

Q. It is stated here that the City of New York has diverted a portion of the waters of the West Branch of the Byram river; this action has been commenced to
510 obtain an injunction restraining the defendant from diverting portions of the waters of the West Branch of the Byram river; what difference, if any, in your opinion, Mr. Hoyt, does the diversion of the waters of the West Branch of the Byram river make in the value of the property in question? *A.* So far as I can judge it makes no difference.

Q. Did you notice the flow of the East Branch of the Byram river? *A.* I did.

Q. Generally speaking what quantity of water did you see there as compared with the necessities of this farm?

Mr. MARSHALL—I object upon the ground that it has not been shown that he knows the necessities of this farm.

Q. Mr. Hoyt, how many farms have you examined in your lifetime? *A.* It would run into a good many hundreds.

Q. Do you know the necessities of a farm so far as water is concerned? *A.* I think I do.

Q. You have been called upon, have you not, to value farms where streams ran through them? *A.* I have.

Q. And where cattle have been kept? *A.* Yes, sir.

Q. And do you or do you not know the quantity of water necessary for a farm for farming purposes? *A.* I think I do.

Q. Now, will you answer the question? (Question read.) *A.* There is a great abundance of water, a great surplus of water, so far as the necessities of the farm is concerned.

Q. Now, assuming that the East Branch of the Byram river is in no way diverted by the City of New York, and that this farm has for its advantages and purposes all the waters of the West Branch of the Byram river, what difference, if any, in the value of this farm would there be? *A.* I don't think there would be any difference.

Q. What, in your opinion and from your experience, is the market value of this property? *A.* You are speaking of the Pine property now?

Q. Yes, sir. *A.* $9,000, or $90 an acre.

Q. How far is this farm from the nearest railroad station? *A.* It is about four miles from Port Chester, and about the same distance from Greenwich.

Q. Does the farm give evidence of having been kept up in a good state of cultivation? *A.* It does not.

Q. Is it what you would call an expensive or cheap neighborhood where the farm is located? *A.* It is a cheap neighborhood.

514 *Q.* What use was made of the water from the Byram river that you saw? *A.* So far as I could examine and ascertain, the waters of the Byram river could be used, but as I understand were not used generally, for stock purposes; that the only direct use made of the Byram river was to supply a boiler which furnished the power for a stone crusher which is upon the property, and the water is conveyed from the Byram river into a tank or reservoir and pumped from there into the boiler.

Q. To what extent is water valuable to a property of this kind, either the Muller or the Pine property? *A.* To the extent that it can be utilized for whatever purpose required or adapted to.

Q. Now take the Muller property, what sum did you
515 value that? *A.* $6,600.

Q. I repeat the question to you in relation to the Muller property that I asked you as to the Pine property; what difference in value, if any, has been caused by the City diverting the waters of the West Branch of the Byram river. *A.* The market value?

Q. Yes, sir? *A.* I think no difference.

Q. Is there, in your opinion, from what you have seen, water enough to supply all the needs of the farm for the use of cattle? *A.* Abundance of water and for forty more farms like it.

Cross-examination:

516 By Mr. MARSHALL:

Q. How much water has been diverted from the Byram river in front of Mr. Pine's property? *A.* In point of gallons, I could not say; I would only know as to——

Q. I did not ask the reasons; when you testified that the diversion makes no difference you testified without knowing what the diversion has been, did you or did you not? *A.* No, sir; I say——

Q. You say no you do not, is that your answer?

Counsel for the City demands that the witness be allowed to continue and complete his answer.

Mr. MARSHALL—I object to his answer being anything 517
but yes and no; I submit that no witness has a right on cross-examination to give anything but a yes or no answer to a yes or no question.

Q. When you testified that the diversion made no difference, so far as you could judge, did you or did you not know what the diversion had been? *A.* Only by what I——

Q. I ask you whether you did or did not know what the diversion had been? *A.* Personally, I did not.

Q. If you did not know personally, how did you know? *A.* I know by information I believe to be true.

Q. What is the information? *A.* The information was that the report of the engineers was that about 518
one-quarter of the water from the Byram Pond was diverted.

Q. How much water was there from Byram Pond? *A.* I don't know, sir, in gallons.

Q. How much water does Mr. Pine get below the junction of the stream? *A.* I don't know, sir, in gallons.

Q. Assume both the East and West Branch of the Byram river to be diverted, is there any damage sustained to Mr. Pine, in your opinion?

Mr. DYKMAN—Objected to, on the ground that both the East and West Branch are not diverted, that it assumes a state of affairs to exist that does not exist and is a mathematical impossibility, and was so at the 519
commencement of this action.

A. To be entirely diverted, certainly.

Q. Now, assuming a farm of about 100 acres through which there is flowing a stream of water from 10 to 25 feet in width, assume that all the water from that stream is diverted, is the farm damaged in your opinion as an expert? *A.* In my judgment it would be; I wish to qualify that by saying that this stream does not go

520 through the Pine farm; it goes on the borders of the Pine farm.

Q. Assume a farm of 100 acres with a stream of water 10 to 25 feet wide flowing along its edge, the owner owning to the middle of the stream, in your opinion if that stream is entirely diverted, is the farm damaged? *A.* I think it would be.

Q. If it is diverted to the extent of one-half, is it damaged? *A.* That would depend entirely upon the uses to which the water is put and the demand for it.

Q. Would it depend upon only the actual uses to which the water was put? *A.* Not the present uses of that farm; I don't mean——

Q. (Repeated). *A.* In my judgment that would be
521 the--all the uses that I could ascertain would be its present use.

Q. Won't you answer that? (Repeated.)

Mr. DYKMAN—That it objected to; the question has been answered.

Q. I want an answer to that question.

Mr. DYKMAN—I object to any further statement of counsel to the witness. The question has been answered.

Q. (Repeated) Do you understand the question? *A.* I think I do; I think I answered it, but, however, I
522 will answer it again; it would depend upon the uses and adaptation of the water to the farm——

Mr. MARSHALL—I will enter an objection right here.

Q. (Repeated). *A.* In my judgment it would.

Q. You would not then take into consideration the possibilities of the owner of such a piece of real estate wishing to use the water in a more expansive way than he was at the time you examined it? *A.* I might consider it.

Q. You would consider that? *A.* Yes.

Q. Then your opinion on that point would depend very largely upon what the owner thought? *A.* On what the uses of the water was practically adapted to that property. 523

Q. Did you take into consideration the fact, in reaching your statement, that there was no damage here—did you take into consideration the fact the owner might or might not make a mill pond there, or as to whether he could or could not?

Mr. DYKMAN—That is objected to on the ground that Mr. Pine only owns on one side and the construction of a dam would be impossible.

A. I took into consideration that he could not create a mill pond on his present ownership. 524

Q. Assume that the statutes of Connecticut give him the power to flood the lands adjoining by the taking of proper legal proceedings, would the stream and the quantity of water in it then affect the value? *A.* Certainly it would under those circumstances.

Q. Have you in your long experience as a real estate broker ever had parties in purchasing tracts of land in the country districts insist that there should be running streams of water through them? *A.* Oh, yes, sir; many times.

Q. Can you see the Long Island Sound from the elevation of Mr. Pine's farm? *A.* There is on the southwest portion of the Pine farm a point where you can see the Sound. 525

Re-direct examination:

By Mr. DYKMAN:

Q. Was that considered by you in forming an estimate of the Pine property? *A.* Every element I know of was considered.

Q. If the statutes of Connecticut permit the acquisition by the owner of real property for the purpose of building a dam, what part of Mr. Pine's property would be flooded, take the dam 20 feet high, for instance?

526 Mr. MARSHALL—I object on the grounds that the witness is now shown to be an engineer, or capable of judging elevations or flowage of water.

A. That would depend upon where the dam upon Mr. Pine's property is erected.

Q. How far above the level of the river, as near as you can gauge by your eye, is this house? *A.* I should say about not to exceed 6 feet.

Q. Then along the western bank of the river as you go north toward the Muller property, what is the topographical situation of the Pine meadows?

Mr. MARSHALL—Objected on the ground the witness is not an engineer and not competent to judge of the
527 elevation.

A. The Pine meadows, so far as meadows are concerned, do not reach the river beyond the stone crusher; the location of the mill known as the stone crusher, immediately beyond the property, becomes quite abrupt on its banks, rough and somewhat precipitous, so it would not flood any meadows by raising a dam 15 or 20 feet on the Pine property, to any extent; it might possibly back up a little; while on the other side of the river it would flood the highway.

April 2, 1900.

WILLIAM HOYT.
By JAMES A. RENWICK,
528 U. S. Examiner.

CHARLES L. AUSTIN, called as a witness on behalf of the defendant, was duly sworn, testified as follows:

Direct examination:

By Mr. DYKMAN:

Q. Mr. Austin, where do you reside? *A.* Port Chester, New York.

Q. What is your occupation? *A.* Real estate dealer.

Q. With your office at Port Chester? A. Yes, sir. 529
Q. You are acquainted with the Byram valley? A. Yes, sir.

Q. And with the Pine property? A. Yes, sir.
Q. Muller property? A. Yes, sir.
Q. And you have examined them recently? A. I have.

Q. And you have been advised, have you not, that a portion of the waters of the West Branch of the Byram river have been diverted by the City of New York? A. I have.

Q. When you were examining the Pine property and the Muller property did you see any water flowing down the Byram river? A. I did.
Q. Generally speaking, to what extent and in what 530
quantity as compared with the necessities of the farm?

Mr. MARSHALL—I object until you show he knows the necessities of the farm.

Q. How large a stream did you see? A. A large stream.

Q. How wide, going by the Pine farm; just take it at the bridge there? A. Oh, I should judge 15 feet wide, anyway.

Q. And how deep? A. Well, it would vary from an inch to five or six inches; maybe more in some places.
Q. A rapid or a sluggish flow? A. A good flow.
Q. In your judgment, how is the property affected
for the uses of a farm? A. Plenty of water there, in 531
my opinion, for all farm purposes.

Cross-examination:

By Mr. MARSHALL:

Q. You say there was plenty of water there for all farm purposes? A. Yes, sir.
Q. That would depend upon what the farm purposes were, would it not? A. I hardly think so.
Q. What would it depend on if it would not depend

532 on what the farm purposes were? *A.* I think for any farm purpose it could be used, for there would be more than enough water to equal the demand.

Q. How about its affecting the possibilities of the location of a mill pond upon the farm?

Mr. DYKMAN—Objected to on the ground that he only owns on one side of the river and has never acquired any right to build a dam or a reservoir, and must treat the property as described in the complaint in this action.

A. In my opinion, I don't see how they could have a mill site there, only owning on one side of the river.

533 *Q.* You are not an engineer, are you? *A.* No, sir; I am not; I don't qualify as such.

Q. You are not a lawyer? *A.* No, sir; I am not.

Q. You are not familiar with the statutes of Connecticut with regard to the flowage of land, are you? *A.* Well, I was looking over the farm, and Mr. Johnson informed me they had the right, according to the laws of Connecticut, to overflow their neighbor's property.

Q. But you have never been called upon to value property with reference to the statutory rights of the State of Connecticut? *A.* No, sir.

Q. The one inch to five inches of water in that stream was of value to the farm? *A.* Yes, sir.

Q. Would from ten to twelve inches have been of

534 more value? *A.* For farm purposes?

Q. No; I simply ask would it be of more value for any purpose? *A.* It might be in some instances.

Q. In what instances would not ten to twelve inches be of more value? *A.* If he has sufficient for all his purposes with five inches, I don't see how ten inches is going to benefit him.

Q. How about future purposes?

Mr. DYKMAN—Objected to as too remote and too indefinite.

A. If he has future purposes that he could use, it would be more benefit to have more water; there might be such a case. 535

Q. Which would you rather have, a tract of land with a stream twenty feet wide, with one to five inches of water, or a stream twenty feet wide, with from ten to twelve inches, with a rapid flow increased by the quanity of water? *A.* Why, the more water—I should say the more water there was the more value.

Q. You never visited this property in the summer time? *A.* Yes, I have been by it many times.

Q. Do you live there? *A.* I drive around there.

Q. Your business takes you through there, in connection with real estate? *A.* Yes, sir.

C. L. Austin. 536

Subscribed to before me
April 10, 1900.

James A. Renwick,
U. S. Examiner.

J. Henry Clark, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination:

By Mr. Dykman: 537

Q. Mr. Clark, where do you reside? *A.* I reside in the Town of Rye.

Q. How near to the Byram river? *A.* Well, the nearest part is about half a mile.

Q. How long have you known the Byram river, in the neighborhood of the Pine and Muller property? *A.* About sixty years.

Q. And do you know the East Branch? *A.* Yes, sir.

Q. You do not own any property on the Byram river, do you? *A.* No, sir.

Q. And your occupation is what? *A.* Farmer.

538 Q. Do you know the Pine property? A. Yes, sir.

Q. And the Muller property? A. Yes, sir.

Q. Have you recently examined the Pine property? A. Day before yesterday, I think.

Q. Did you notice the Byram river? A. Yes, sir.

Q. For how many years have you noticed it? A. About sixty years, I suppose; as long as I can remember.

Q. Have you noticed it within the last three or four years? A. Oh, yes; I have been up that street probably twenty times during the course of the year.

Q. When did you last look that property over? A. Well, I was up there on that farm day before yesterday.

539 Q. What kind of a farm is it, what you call a first-class farm? A. Well, it is a fairish sort of farm; it is pretty rough.

Q. Did you see any water flowing by it? A. Oh, yes, plenty of water by it apparently.

Q. Did you notice the Muller property? A. Yes.

Q. Any water flowing by that? A. Yes, sir.

Q. Did you see the point of intersection of the East and West Branch? A. Yes, sir.

Q. Any water coming down the West Branch of the Byram river when you were there? A. Yes, sir.

Q. How much? A. I should judge very near as much as the East Branch.

Q. When you saw that property was there water
540 enough there for all ordinary household, domestic and farm uses on these two properties? A. Plenty of it.

Q. More than could be used on the property? A. More than could be used for farm uses; enough water there, I should judge, to water 500 head of cattle flowing down that river now.

April 2, 1900.

I. Henry Clark,
By James A. Renwick,
U. S. Examiner.

Counsel for the City states that the evidence on 541
behalf of the defendant being practically completed, he will forward to counsel for the plaintiff a statement of the comparative levels of the Byram river and King street, and will close his case one week from to-day.

Hearing adjourned until Thursday, January 11, 1900, at 2 P. M.

NEW YORK, March 1, 1900.

Met pursuant to adjournment.

Present—The EXAMINER; Mr. MARSHALL and Mr. 542
WILLIAMS, for plaintiffs; Mr. DYKMAN, for defendant.

GEORGE W. BIRDSALL, recalled as a witness on behalf of the defendant, having been previously duly sworn, testifies:

By Mr. DYKMAN:

Q. Mr. Birdsall, what wards in the City of New York are supplied by water from the Bronx, Byram and Rye Ponds?

Objected to by Mr. Marshall upon the ground that it is immaterial, incompetent and irrelevant. 543

A. Portions of the Twenty-third and Twenty-fourth Wards of the City of New York.

Q. About how many persons are dependent upon that supply for their water?

Same objection.

A. About 125,000 people.

Q. What relative proportion of the supply for these

544 125,000 people is furnished by the waters of the Byram river?

Same objection.

A. About seven-twentieths.

Q. What fire protection is there in the Twenty-third and Twenty-fourth Wards, or rather in that part of those wards which is supplied by this water supply other than the Bronx, Byram and Rye Ponds supply?

Same objection.

A. Well, I can only say that seven-twentieths of it.

Q. Take the Twenty-third and Twenty-fourth Wards;
545 a certain portion of those wards are supplied solely by this supply? *A.* No; that is, you are talking of the Byram?

Q. No; by this supply I mean by the Bronx, Byram ——*A.* Oh, yes; certainly.

Q. Well, take those portions of those two wards that rely entirely on the Kensico, Bronx, Byram and Rye Ponds supply, what fire protection is there other than this supply in question for those wards?

Same objection.

A. None at all.

GEORGE W. BIRDSALL.

Subscribed before me }
March, 1900. }
546

JAMES A. RENWICK,
U. S. Examiner.

Defendant rests.

GEORGE W. BIRDSALL, recalled by plaintiffs' counsel:

By Mr. MARSHALL:

Q. Mr. Birdsall, at the session of May 5, 1899 (p. 59 of the minutes), there were two dams referred to

at this Byram Pond or Lake; will you state what two dams you referred to in your testimony there; describe them? *Q.* You see, this is another dam; on the Byram river, about seven hundred feet north of the Connecticut State line, a dam has been placed across same for diverting the waters of the Byram river through a tunnel into the Kensico Reservoir, that is the Bronx river supply; in order to conserve the waters of the Byram river above this dam, it became necessary to build another dam across the river just about four hundred feet below Byram Pond, which forms a storage reservoir; all of the water passing through this dam or drawn from this storage reservoir passes down the Byram river to the lower dam; thence either over the dam to the lower Byram river or through the tunnel to the Kensico Reservoir. 547 548

GEORGE W. BIRDSALL.

Subscribed before me, }
March, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

Case closed.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss.:*

I, James A. Renwick, an examiner in equity, duly appointed, qualified and sworn in the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing depositions of Samuel Pine, Frederick Muller, George W. Birdsall, Edwin A. Knapp, Daniel M. Griffin, Lawrence B. Jenckes, Newton S. Johnson, Samuel Vail, Fred. K. Betts, Nathan J. Hughes, William L. Banks, William H. Hoyt, Charles L. Austin, J. Henry Clark, witnesses produced on the part of the complainants and the defendant, were taken before me 549

550 in the cause in the caption named, under and pursuant to the Sixty-seventh Rule of the Supreme Court of the United States in equity as amended; that the parties to the said cause were present at the taking of the same, complainants by their counsel, Stephen G. Williams, Esq., and the defendant by its counsel, Henry T. Dykman, Esq.; that before testifying, the said witnesses were by me duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the depositions were reduced to writing from their statements, and the same subscribed and sworn to before me, except where the witnesses after due notice, failed to appear and sign their depositions, in which case, the same has been signed by
551 me, as therein appears.

And I do further certify that I am not an attorney nor of counsel for any of the parties in said deposition or caption named, and am in no wise interested in the result of this suit.

In Testimony Whereof, I have hereunto set my hand, at New York, N. Y., on this 13th day of April, 1900.

JAMES A. RENWICK,
U. S. Examiner.

552

CIRCUIT COURT OF THE UNITED STATES 553

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

In Equity.

554

It is hereby consented that Complainants' Exhibit No. 1 of October 26, 1899, and Complainants' Exhibit No. 2 of October 26, 1899, being each a photograph of the Byram river, and Complainants' Exhibit No. 1 for identification, May 5, 1899, and Complainants' Exhibit No. 2, May 5, 1899, the same being a map of the portion of the State of Connecticut, be not reproduced and the copies thereof be not served by either party on the other, but that the filing of the same and the production of the same at the final hearing before the Court shall be sufficient.

Dated New York, May 4, 1900.

MORAN & WILLIAMS,
Solicitors for Complainants. 555

JOHN WHALEN,
Solicitor for Defendants.

Indorsed:

Circuit Court of the U. S. for the Southern District of New York. In Equity. Samuel Pine & Fredk. Muller, Complainants, *vs.* The Mayor, Aldermen and Commonalty of the City of New York, Defendants. Consent and rule to filing and producing certain exhibits without reprinting and serving same. Moran & Williams, Solicitors for Complainants, 30 Broad street, New York City (Manhattan). U. S. Circuit Court. Filed May 7, 1900. John A. Shields, Clerk.

556 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

In Equity.

557

We hereby consent that the two letters of which the following are copies, be printed and made part of the case on appeal herein.

FRANCIS M. SCOTT,
Counsel to the Corporation.

MORAN & WILLIAMS,
Complainants' Solicitors.

NEW YORK CITY, May 28, 1896.

558

PINE & MULLER
vs.
THE MAYOR, ETC., OF NEW YORK.

DEAR SIR—I feel that in justice to my clients and to the Court, that it is no less than my duty to inform you that I yesterday, Wednesday, May 27, 1896, saw water flowing through the outlet which diverts the waters of the Byram river. The water was running

through the channel built for it, which is, in my opinion, at least nine feet wide to a depth of at least twelve inches. 559

I am informed and can produce affidavits to verify my information, that the water-way was opened on Saturday, May 23, and has been continuously open from that time.

In view of the argument of the Corporation Counsel that the City authorities had no intention to divert the water for some time to come, and in view of the affidavit of George W. Birdsall, the latter part of folio 3, "It is not the intention of the City authorities to make use of this dam for a long time in the future, at least not for one year. When completed it is proposed by means thereof to divert a part or all * * *." 560

It has seemed to me no more than courteous to send a copy of the foregoing letter to the Corporation Counsel. I am sending him one by the same mail as this. I inclose herewith copy of such letter.

Very respectfully yours,

(Signed) STEPHEN G. WILLIAMS.

Honorable HOYT H. WHEELER, Judge,
Post-office Building,
New York City.

561

NEW YORK, May, 1896.

PINE & MULLER *vs.* MAYOR, ETC.

Honorable HOYT H. WHEELER, Judge, United States Circuit Court, Brattleboro, Vermont.

DEAR SIR—Mr. Stephen G. Williams, of counsel for the plaintiffs in this suit, has forwarded me a copy of a letter addressed to you, dated May 28, 1896, to the effect that the defendants were already diverting water from the Byram river.

562 I have ascertained from Mr. Birdsall, Chief Engineer of the Croton Aqueduct, that the following are the facts:

During the winter there were several heavy freshets in the locality which washed away the temporary dam built to keep the water back so that the laborers could work on the foundation of the permanent dam. The ground in the vicinity is swampy, and when, as at present, there is an abundance of water, it spreads over a large area.

In order to enable the workmen to rebuild the temporary dam a part of the water of the river has been diverted temporarily into the artificial channel leading
563 to the Bronx river.

This diversion will continue only until the temporary dam can be completed, that is, for a period of about two weeks.

In the meantime no possible injury to the plaintiffs can result. The only effect of the diversion is that the quantity of water running past their premises is slightly less than it otherwise would be. There is still an abundance of water for their use.

Very respectfully,

(Signed) FRANCIS M. SCOTT,
Counsel to the Corporation.

564

Indorsed:

United States Circuit Court, Southern District of New York. In Equity. Samuel Pine and Frederick Muller, Complainants, against the Mayor, Aldermen and Commonalty of the City of New York, Defendants. Consent to enter Letters. Moran & Williams, Complainants' Solicitors. Stephen G. Williams, of Counsel, No. 45 Exchange place, New York City. U. S. Circuit Court. Filed October 16, 1896. John A. Shields, Clerk.

QUIT CLAIM DEED.

GILLESPIE BROS., Printers and Stationers, Stamford, Conn. 565

Know all men by these presents, that I, James Pine, of the town of Rye, County of Westchester and State of New York, for the consideration of One Dollar and other good and valuable considerations received to my full satisfaction of Samuel Pine of the town of Greenwich, County of Fairfield and State of Connecticut, do by these Presents remise, release and forever Quit Claim unto the said Samuel Pine all right, title, interest, claim and demand, whatever, which I the said Releasor have or ought to have in or to ALL that certain tract, piece or parcel of land situated in said town of Greenwich and State of Connecticut, with dwelling house, barn and other buildings and improvements 566 thereon, containing one hundred and six (106) acres, be the same more or less, bounded northerly by land formerly of James Wilson, deceased, now of Emmeline Sutton, westerly by land formerly of said James Wilson, deceased, now of said Emmeline Sutton in part, and in part by land formerly of said James Pine and land of estate of the late William Moshier, deceased; southerly by land of estate of said William Moshier, deceased, and land in the possession of William H. Craft, and Easterly by Byram River, being the same premises purchased by me from the heirs of Erastus Rundle, deceased, in or about the year 1870. Hereby reserving and excepting, however, from and out of the property and privileges hereby conveyed the whole 567 use, income and profits of the same for and during the term of my natural life, and the said Samuel Pine is to pay all the taxes and assessments and make all necessary improvements on said property during my life. Reserving and excepting also for the term of my natural life all rights to damages or compensation that may arise or become due for any taking of or injury to my riparian rights in or to said Byram River.

588 To have and to hold the premises, with all the appurtenances, unto the said Releasee his heirs and assigns forever so that neither I the said Releasor nor my heirs, nor any other person under me or them, shall hereafter have any claim, right or title in or to the premises, or any part thereof, except as above reserved and excepted, but therefrom I and they are by these presents forever barred and secluded, except as above reserved and excepted.

In Witness Whereof I have hereunto set my hand and seal the 31st day of May, A. D. 1888.

JAMES PINE. [SEAL.]

Signed, sealed and delivered in the presence of— 589

J. HENRY GILBERT.
JOSEPH IRELAND.

STATE OF NEW YORK, Westchester County.

TOWN OF RYE, August 11, 1888.

Personally appeared before James Pine, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed before me.

J. HENRY GILBERT,
Commissioner for Connecticut,
Resident at Portchester,
N. Y. 570

J. Henry Gilbert, Commissioner for Connecticut.

Indorsed:

Quit Claim Deed, Samuel Pine from James Pine. Received for Record Sept. 23d, 1890, at 2.45 o'clock afternoon, and recorded in Greenwich Land Records, in Book No. 60 at page 352 by James R. Mead, Town Clerk. Plff.'s Exhibit Pine deed, Oct. 4", 1897. J. A. R. Examiner. (Town of Greenwich, Conn., Seal.)

WARRANTY DEED. GILLESPIE BROS., Printers and Stationers, Stamford, Conn. 571

TO ALL PEOPLE TO WHOM THESE PRESENTS SHALL COME—GREETING:

Know ye that We, Andrew Burns and Eloise Burns, husband and wife, of the Town of Greenwich, County of Fairfield and State of Connecticut, for and in consideration of Forty-eight Hundred Dollars received to our full satisfaction of Frederick Muller of the City, County and State of New York, do give, grant, bargain, sell, and confirm unto the said Frederick Muller, all that certain tract of land, with buildings thereon located at Riversville in said Town of Greenwich in quantity Forty acres, more or less, Bounded Northerly by land of Samuel K. Wilcox and land of Warren and 572
Jotham Sherwood, Easterly by the Highway leading from Glenville to North Greenwich, Southerly by land of W. H. H. Knapp, land of J. Wesley Sherwood and land of Mark Mead, and Westerly by land of Mark Mead.

Being the same premises conveyed to the Grantor Eloise Burns by her Father, Samuel Peck by Warrantee Deed, dated August 21, 1886, and Recorded in the Land Records of said Greenwich in Vol 54 at page 173.

The premises hereby conveyed are subject to a certain $2000 Mortgage in favor of Lizzie A Pardee, Dated March 8, 1890, and Recorded in said Records in Vol 63 at page 15 which mortgage the Grantee herein 573
assumes and agrees to pay as a portion of the above named consideration.

To have and to hold the above granted and bargained premises, with the privileges and appurtenances thereof, unto Him, the said grantee, His heirs and assigns forever, to His and their own proper use and behoof. And also, We the said grantors do for ourselves our heirs, executors and administrators, covenant with the said grantee His heirs and assigns that at and until the ensealing of these presents, we are well seized of the premises, as a good indefeasible estate in fee simple; and have good right to bargain and sell

574 the same in manner and form as is above written; and that the same is free from all incumbrances whatsoever, except as above mentioned.

And furthermore We the said grantors do by these presents bind ourselves and our heirs forever to warrant and defend the above granted and bargained premises to Him, the said grantee and His heirs and assigns, against all claims and demands whatsoever, except as aforesaid.

In Witness Whereof We have hereunto set our hands and seals this 2nd day of February, A. D. 1891.

ANDREW BURNS. [SEAL.]
ELOISE BURNS. [SEAL.]

575 Signed, sealed and delivered in presence of }

MATHIAS PFEIFFER,
FRED A. HUBBARD.

FREDERICK A. HUBBARD,
Notary Public,
Greenwich,
Fairfield Co.,
Conn.

GREENWICH, February 2, 1891.

STATE OF CONNECTICUT, Fairfield County, } ss.:

Personally appeared Andrew Burns and Eloise Burns, husband and wife, the above named Grantors,
576 signers and sealers of the foregoing instrument, and acknowledged the same to be Their free act and deed before me.

FRED A. HUBBARD,
Notary Public.

Indorsed:

Warranty Deed. Frederick Muller from Andrew Burns & wife. Received for Record February 2nd, 1891, at 2.30 o'clock afternoon, and recorded in Greenwich Land Records, in Book No. 61, at page 321, by James R. Mead, Town Clerk. Plff. Exhibit Muller deed, Oct. 4th, 1897. J. A. R., Examiner, (Town of Greenwich, Conn., Seal). Frederick A. Hubbard, Attorney at Law, Greenwich, Conn.

Complainant's Exhibit, November 16, 1897. 1b —Byram River weir overflow.

J. A. R., Examiner.

Statement showing flow of water over weir on Byram River at Tunnel Reservoir.

Date 1895.	Rainfall.	Gallons.	
July 1st	.17 inches	3,089,180	
2nd		2,564,407	
3rd		1,722,961	
4th	.69	4,058,588	
5th	.61	8,013,773	
6th	.46	7,018,513	
7 & 8th		6,581,634	2b
9th		1,835,412	
10th		2,068,070	
11th		1,951,741	
12th		1,835,412	
13th	.32	1,722,961	
14th		1,293,836	
15th		1,191,625	
16th	.21	1,395,947	
17th		1,395,947	
18th		1,292,544	
19th		1,085,736	
20th	.77	2,361,477	
21st		4,239,544	
22nd	.92	3,657,899	3b
23rd		2,194,739	
24th		1,395,947	
25th	.30	1,189,140	
26th		1,189,140	
27th	1.23	2,344,684	
28th		2,704,002	
29th		1,503,228	
30th	.61	1,845,752	
31st		1,956,911	

	Date 1895.	Rainfall.		Gallons.
4b	Aug. 1st			1,292,544
	2nd			997,843
	3rd			648,857
	4th	.35		917,706
	5th			1,292,544
	6th			666,952
	7th	.63		1,256,352
	8th			1,845,752
	9th			1,085,736
	10th	.15		995,258
	11th			2,230,940
	12th	1.14		3,942,259
	13th			2,621,279
5b	14th			1,499,351
	15th			1,096,077
	16th			723,824
	17th			723,824
	18th	.43		814,302
	19th			814,302
	20th			997,843
	21st			824,643
	22nd			491,166
	23rd			413,614
	24th			745,797
	25th			824,643
	26th			491,166
	27th			491,166
6b	28th			491,166
	29th			491,166
	30th	.02		491,166
	31st	.19		568,719
	Sept. 1st			493,751
	2nd			413,614
	3rd			413,614
	4th			284,359
	5th			351,571
	6th			491,166
	7th	.09		491,166
	8th			491,166
	9th			568,719

Date 1895.	Rainfall.	Gallons.	
Sept. 10th		642,272	
11th		568,719	
12th	.48	351,571	
13th		219,732	
14th		219,732	
15th		219,732	
16th	.10	284,359	
17th		413,614	
18th	.19	568,719	
19th		1,649,286	
20th		3,089,180	
21st		3,360,614	
22nd		3,360,614	
23rd		3,218,434	8b
24th		2,820,331	
25th		2,559,237	
26th	.58	2,559,237	
27th		2,307,191	
28th		1,951,741	
29th	.21	1,719,083	
30th	.65	1,602,754	
Oct. 1st		1,602,754	
2nd		1,602,754	
3rd		1,602,754	
4th		1,395,947	
5th		1,395,947	
6th		1,951,741	
7th		2,559,237	9b
8th	.27	2,817,745	
9th		2,688,491	
10th		1,845,752	
11th		997,843	
12th	.96	2,249,026	
13th	1.23	5,364,057	
14th	.20	6,010,329	
15th	.14	4,398,527	
16th		3,502,794	
17th		2,824,208	
18th		2,300,728	
19th		1,951,741	

	Date 1895.	Rainfall.	Gallons.
10h	Oct. 20th		1,602,754
	21st		1,602,754
	22nd		1,602,754
	23rd		1,602,754
	24th		1,602,754
	25th		1,602,754
	26th		1,602,754
	27th		1,499,351
	28th	.06	1,395,947
	29th		1,395,947
	30th		1,395,947
	31st	.33	3,298,572
	Nov. 1st	1.32	5,506,237
11h	2nd	.17	5,347,254
	3rd	.11	3,950,014
	4th		2,564,407
	5th		1,951,741
	6th		1,719,083
	7th		1,499,351
	8th		1,609,217
	9th		1,835,412
	10th	.07	1,503,228
	11th		1,085,736
	12th		995,258
	13th		1,293,836
	14th		5,493,312
	15th	2.41	13,869,997
12h	16th		12,990,067
	17th	.08	6,514,421
	18th		3,942,259
	19th		3,089,180
	20th	.12	3,368,369
	21st		3,232,652
	22nd		2,559,237
	23rd		3,376,124
	24th	.18	3,652,729
	25th	.04	4,102,534
	26th	.68	9,875,036
	27th	.76	12,382,571
	28th		7,871,592

Date 1895.	Rainfall.		Gallons.	
Nov. 29th			5,189,564	
30th			4,381,724	
Dec. 1st			4,381,724	
2nd	.62		7,393,351	
3rd			8,776,373	
4th			6,178,360	
5th			4,704,860	
6th			3,942,259	
7th			3,647,559	
8th			3,218,434	
9th			3,089,180	
10th			2,947,000	
11th			3,513,134	
12th			5,351,132	14b
13th				
14th				
15th				
16th				
17th				
18th				
19th				
20th				
21st				

13b

15b

Defendant's Exhibits Betts Memo., Dec. 21, 1899.

Gaugings run from July 1st, 1895, to Dec. 12th, 1895, when gauge was washed out.

Rainfall 2.91 for month.

Aug. 1895	Amount Measured	from 8.66 sq. miles.
1st	1292544	
2d	997843	
3d	648857	
4th	917706	
5th	1292544	
6th	666952	
7th	1256352	
8th	1845752	
9th	1085736	
10th	995258	
11th	2230940	
12th	3942259	
13th	2621279	
14th	1499351	
15th	1096077	
16th	723824	
17th	723824	
18th	814302	
19th	814302	
20th	997843	
21st	824643	
22d	491166	
23d	413614	
24th	475597	
25th	824643	
26th	491166	
27th	491166	
	30475540	

16 15 12 14 12 12
30475540

28th	491166	Minimum daily flow per Sq. mile 47709 Galls.
29th	491166	Minimum daily flow for 18.22 Sq. miles 869258 Galls.
30th	491166	
31st	568719	
	32517757	Mean daily flow per Sq. mile 121127 Galls.
		Mean daily flow for 18.22 Sq. miles 2206934 Galls.

Rainfall 1.65 inches.

Sept. 1895

1st	493751	Galls.
2d	413614	
3d	413614	
4th	284359	
5th	351571	
6th	491166	
7th	491166	
8th	491166	
9th	568719	
10th	642272	
11th	568719	
12th	351571	
13th	219732	
14th	219732	
15th	219732	
16th	284359	
17th	413614	
18th	568719	
19th	1649286	
20th	3089180	
21st	3360614	
22nd	3360614	
23rd	3218434	
24th	2820331	
25th	2559237	Minimum daily flow per Sq. mile 25373 Galls.
26th	2559237	Minimum daily flow per Sq. mile 462296 Galls.

27th	2307191
28th	1951741
29th	1719083
30th	1602754
	37685278

Mean daily flow per Sq. mile 145055 Galls.

13 14 15 14 13 12

Mean daily flow for 1822 Sq. miles 2642900 Galls.

Rainfall 3.09

Oct 1895

1st	1602754
2nd	1602754
3rd	1602754
4th	1395947
5th	1395947
6th	1951741
7th	2559237
8th	2817745
9th	2688491
10th	1845752
11th	997843
12th	2249026
13th	5364057
	28074048
	862865
	28074048
14th	6010329
15th	4398527
16th	3502794
17th	2824208
18th	2300728
19th	1951741
20th	1602754
21st	1602754
22nd	1602754
23rd	1602754
24th	1602754
25th	1602754
26th	1602754
27th	1602754

28th	1395947	Minimum daily flow per Sq. mile 115224 Galls.
29th	1395937	Minimum daily flow for 18.22 Sq. miles 2099381.
30th	1951741	
31st	2559237	
	69187279	Mean daily flow per Sq. mile 257719 Galls.
		Mean daily for 1822 Sq. miles 4695640 Galls.

During the entire summer of 1895 there were but 11 days when the flow for 18.22 Sq. miles was less than 1,000,000 galls. per day.

Total drainage Area of Byram River above Samuel Pines, exclusive of Area diverted by New York City= 18.22 Sq. miles.

Area diverted 8.66 Sq. miles.

Total Rainfall for the Year 1895=40.07 inches.

Average Yearly rainfall at Kensico=47.93 inches.

Fred. K. Betts, Asst. Eng.

577 CIRCUIT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendant.

} In Equity.

578

It is hereby consented that complainants' exhibits, both of October 4, 1897, one being deed from James Pine to Samuel Pine, dated 31st of May, 1888, and acknowledged August 11, 1888. and recorded September 23, 1890, in Greenwich Land Records in Book Number 60, page 352, and the other being deed from Andrew Burns and Eloise Burns his wife, to Frederick Muller, dated and acknowledged 2d day of February, 1891, and recorded 2d day of February, 1891, in Greenwich Land Records, in Book Number 61, page 321, be not filed, but that copies thereof may be filed in this court in lieu of the originals.

Dated New York, April 23, 1900.

579

MORAN & WILLIAMS,
Solicitors for Complainants.
JOHN WHALEN,
Solicitor for Defendant.

Indorsed:

Circuit Court of the United States for the Southern District of New York (In Equity). Samuel Pine and Frederick Muller, complainants, against The Mayor, Aldermen and Commonalty of the City of New York, defendant. Consent to file copies of deeds in lieu of originals. Moran & Williams, Solicitors for Complainants, 30 Broad street, New York, Manhattan.

CIRCUIT COURT OF THE UNITED STATES 580

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendant.

} In Equity.

581

It is stipulated that folios 1A to 17A, comprising pages 7 to 13 of the original depositions in this case, be inserted immediately after page 13 of the printed pleadings and proofs for final hearing, said folios 1A to 17A having been inadvertently omitted from the original printing of proofs for final hearing, and that Complainants' Exhibit November 16, 1897, Byram River Weir Overflow and Defendant's Exhibit "Betts Memorandum" (December 21, 1899, see fol. 407), being two statements of rainfall and water flow be inserted at the end of the proofs for final hearing.

Dated May 28, 1900.

MORAN & WILLIAMS,
Solicitors for Complainants. 582

JOHN WHALEN,
Solicitor for Defendant.

Indorsed:

Circuit Court of the United States for the Southern District of New York. In Equity. Samuel Pine and Frederick Muller, Complainants, against The Mayor, Aldermen and Commonalty of the City of New York, Defendant. Consent and Rule. Moran & Williams, Solicitors for Complainants, 30 Broad street, New York City, Manhattan. U. S. Circuit Court. Filed May 28, 1900. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

SHIPMAN, *C. J.*—The main facts of this case, as presented in the bill in equity, are not controverted in the answer. The complainants, Pine and Muller, are citizens and residents of the State of Connecticut, and each of them owns in fee a separate tract of land in that State, through which or upon and along which, the Byram river flows. This river, which is at the lands of the complainants a non-navigable stream, is made up of two branches. The East Branch is wholly in the State of Connecticut. The West and by far the most important branch rises in Westchester County, New York, flows southeasterly for about five miles in that State into Connecticut and thereafter unites with the East Branch at the farm of Muller about four miles from the New York boundary line. About a mile below his farm, the united stream forms the eastern boundary of Pine's farm for about 3,725 feet and thereafter empties into Long Island Sound. Upon his land there is a deposit of feldspar, which he manufactures, and he uses the water of the river for the needs of his farm-house and steam mill. Muller's farm has a frontage on

both sides of the river of 920 feet and extends on the west side of the river 450 additional feet, making an entire frontage of 2,290 feet. He uses the water of the river for general farm use. The bill in equity alleged that the damage to each complainant by the act of the defendant would be above $2,400.

Shortly before the bill was brought, the defendant began to build a dam across the West Branch of Byram river, at a point in the State of New York about 700 feet from the Connecticut State line, in order to divert the water of that branch into the Kensico Reservoir, which is part of the defendant's extensive system of water supply for the residents of the City of New York, and the dam has been completed at an expense, without any of its appurtenances, of about $45,000. By private arrangements, the defendant settled with the Connecticut mill proprietors on the stream for the injury caused by this dam to their flowage rights, but has never compensated the complainants or other riparian owners for the injury to their riparian rights. The answer admits that the defendant intends to divert some or all the water of the West Branch of the river from its natural channel, and avers that the diversion of the whole of it would be of little or no injury to the riparian owners. The diversion of water by the defendant is, as appears by the testimony of Mr. Birdsall, the Chief Engineer of the system for the water supply of New York, 7,600,000 gallons per day. The total average flow of the river at the junction of the two branches was 24,000,000 gallons per day. The decrease is, therefore, more than one-fourth. Testimony was offered by each party with respect to the value of the two properties and the amount of pecuniary damage in consequence of the diversion of the water. That there will be an actual continuing pecuniary damage more than nominal in amount is manifest, but whether more or less than $2,000, or what will be the exact amount I did not undertake to find because it was unnecessary. In the absence of a plea

to the jurisdiction, the allegation in the bills in equity that the amount of damage in each case exceeded $2,000, "though denied by the answer, even if not sustained by the proof, was sufficient to give the Circuit Court jurisdiction" (Butcher & Drover's Stock Yards Co. *vs.* Louisville & Nashville R. R. Co., 67 Fed. Rep., 35; De Sobry *vs.* Nicholson, 3 Wall., 420). A number of unknown factors enter into an estimate of damage from a diversion of water, such as the probabilities of future years of excessive drought, the prospective uses to which the properties may be applied and the prospective demands for other than agricultural uses, which cause the estimate of actual pecuniary damage to be one of inaccuracy.

The statutes of the State of New York do not undertake to give power to condemn land for public purposes which is situate in another State, and if they undertook to confer such power they would be ineffective (Holyoke Water Power Co. *vs.* Connecticut River Co., 52 Conn., 570; Farnham *vs.* Blackstone Canal, 1 Sumn., 46; U. S. *vs.* Ames, 1 Wood & Min., 76; Rutz *vs.* City of St. Louis, 7 Fed. Rep., 438). Neither is there a Connecticut statute which authorizes the City of New York to exercise any rights of eminent domain over land in Connecticut.

The conclusions which must result from the foregoing facts have been often clearly stated by various courts, and by none more clearly than by the courts of Connecticut and New York. The principles which underlie the case, or which are applicable, are as follows:

1. The right of a riparian proprietor upon a non-navigable stream to the use of the ordinary flow of the water of the stream, as it has been accustomed to flow and not diminished by an unreasonable use by a proprietor above him, "is not an easement or appurtenance, but is inseparably annexed to the soil and is parcel of the land itself" (Wadsworth *vs.* Tillotson, 15 Conn., 366; Clinton *vs.* Meyers, 46 N. Y., 511; Smith *vs.* City of Rochester, 92 N. Y., 463).

2. The unauthorized and uncompensated permanent diversion by a municipal corporation of the water of a non-navigable stream from a riparian owner is not excused by the fact that it was deemed to have been taken for a public benefit. The seizure and permanent diversion is a continuing wrong, unless compensation has been made either by agreement or under process of law and by virtue of authority conferred by the constitution and the statutes of the State (Seifert *vs.* City of Brooklyn, 101 N. Y., 136; Nolan *vs.* New Britain, 69 Conn., 668; Harding *vs.* Stamford Water Co., 41 Conn., 87).

3. An injunction to prevent a permanent and unauthorized seizure and diversion of running water is a proper and is the effectual remedy, because the remedy by an action at law provides only for the damages which had occurred before suit and compels a multiplicity of suits. It is the only efficient remedy for complete relief (Uline *vs.* N. Y. Central R. R. Co., 101 N. Y., 98; Corning *vs.* Troy Iron Foundry, 40 N. Y., 204; Amsterdam Knitting Co. *vs.* Dean, 162 N. Y., 278).

4. The equitable remedy by injunction exists and is to be exercised in the absence of any legislative authority for the infliction of the permanent injury, although the pecuniary damage to the riparian proprietor is not of large amount. The fact of no serious pecuniary damage is not a hindrance to the right of the riparian proprietor to the restoration of the water to its natural course. This principle has been fully stated by the courts of the State of New York (Corning *vs.* Troy Iron Foundry, 40 N. Y., 191; Gilzinger *vs.* Saugertree Co., 66 Hun, 173; affirmed in 142 N. Y., 633; Amsterdam Knitting Co. *vs.* Dean, 162 N. Y., 278; Legg *vs.* Horn, 45 Conn., 409).

5. If a court of equity has power in any case by decree to ascertain and order the payment of dam-

ages by decree of injunction in the alternative, a court of equity will not exercise such power where the defendant has committed a permanent injury without authority of law and without pretense of right to take and retain the property (Pappenheim *vs.* Elevated Railroad, 128 N. Y., 436; Stowers *vs.* Gilbert, 156 N. Y., 600). But a court of equity can properly delay the issuance of an order of injunction to allow the defendants an opportunity to agree with the complainants in regard to adequacy of compensation (Harding *vs.* Stamford Water Co., *supra*).

Let there be a decree, with costs, that if on November 1, 1900, there shall have been no agreement between the parties as to the amount of compensation to the complainants for the injury they have separately sustained by this diversion of the water of Byram river and no payment of such agreed compensation, an order of injunction shall issue to restrain the defendant, its officers, agents and employees, from diverting the water of the West Branch of Byram river, or any part thereof, or from preventing in any way said water or any part thereof, at any time from flowing through its natural channel before, at and below the junction of the two branches of said river.

Indorsed:

United States Circuit Court for the Southern District of New York. Samuel Pine and Frederick Muller *v.* The Mayor, Aldermen and Commonalty of the City of New York. Opinion. Shipman, *C. J.* U. S. Circuit Court. Filed Jun. 27, 1900. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendant.

} In Equity.

This cause came on to be heard at a Term of the United States Circuit Court for the Southern District of New York, and was argued by counsel and thereupon, upon consideration thereof, it is

Ordered, and adjudged and decreed as follows, to wit:

That the complainants in this suit and each of them are entitled to the injunction order of this Court restraining the defendant, its successors and assigns, their and its officers, agents and employees, each, all and any of them, from diverting the water or any part of the water of the West Branch of the Byram river or any part of the water of the Byram river, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and

It is further ordered, adjudged and decreed, that the defendant, its successors and assigns, their and its officers, agents and employees, each, any and all of them, be and they and each of them are hereby perpetually enjoined from diverting the water or any part

of the water of the West Branch of the Byram river, or any part of the water of the Byram river, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and

It is further ordered, adjudged and decreed, that a writ of injunction do issue on the first day of November, in the year nineteen hundred, against the defendant, its successors and assigns, their and its officers, agents and employees and each, any and all of them, commanding them to comply with all and singular the premises, matters and things so enjoined upon them; and

It is further ordered, adjudged and decreed, that the complainants and each of them recover their costs in the premises to be taxed by the Clerk of this Court.

Dated July 24, 1900.

N. SHIPMAN,
Circuit Judge.

We hereby agree to the form of the above proposed judgment.

Dated July 13, 1900.

MORAN & WILLIAMS,
Solicitors for Complainants.
JOHN WHALEN,
Solicitor for Defendant.

Indorsed:

U. S. Circuit Court for the Southern District of New York. In Equity. Samuel Pine & Frederick Muller, Complts. agst. the Mayor, Aldermen & Commonalty of The City of New York, Deft. Judgment. Marshall, Moran, Williams & McVickar, Solicitors for Complts., 30 Broad Street (Manhattan), New York City. U. S. Circuit Court. Filed Jul. 28, 1900. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

In Equity.

Assignment of Errors.

And now comes the above-named defendant by its solicitor, and presents with its accompanying petition of appeal from the judgment rendered in this cause the following assignment of errors:

I.—The Court erred in not deciding that there was sufficient water left the complainants for all their respective uses as ordinary riparian proprietors, and that an injunction should be denied.

II.—The Court erred in not deciding that no substantial injury had accrued or would accrue to complainants, and that an injunction should be denied.

III.—The Court erred in not deciding that no substantial injury had accrued or would accrue to complainants that could not be well compensated for in an action at law, and that an injunction should be denied.

IV.—The Court erred in not deciding the amount of damages, if any (not to exceed $2,400 each, as prayed for in the bill of complaint), the complainants had suffered, or will suffer, in consequence of the acts of defendant, and that defendant be permitted to pay such damages at their option, and on payment of same the complainants deliver to defendant conveyances of the right to divert the stream at the dam near the State line in perpetuity.

V.—The Court erred in not deciding that the public necessities of a great municipality requires the diversion of water complained of, and that an injunction should not issue until such reasonable time as proper remedial legislation is obtained to enable defendant to acquire in condemnation proceedings the right to divert this stream from complainants' lands.

VI.—The Court erred in not deciding that the public necessities of a great municipality require the diversion of water complained of, and an injunction should not issue, but that the complainants should be left to their actions at law for damages.

VII.—The Court erred in not deciding that there has been or will be no damage suffered by complainants which cannot be compensated in money, and no injunction should issue.

VIII.—The Court erred in not deciding that there was no irreparable and irremedial damage, and that therefore an injunction would not lie.

IX.—The Court erred in not deciding that the diversion complained of being done in New York State by a municipal corporation, to whom was delegated by the Legislature of the State the authority to provide for the public necessities of a water supply for a large number of inhabitants of said State, this Court has no power to enjoin their acts in so doing.

X.—The Court erred in deciding that an injunction should issue.

XI.—The Court erred in not dismissing the bill of complainants for improper joinder of parties complainants.

XII.—The Court erred in not deciding that the diversion complained of being done under legislative authority by a municipal corporation in New York this Court has no authority to restrain such acts.

XIII.—The Court erred in granting the injunction since it appeared from the record that the complainants had always had sufficient water for their uses as ordinary riparian proprietors, and since it appeared that no substantial injury had accrued or could accrue that could not be well compensated for in law.

XIV.—The Court erred in admitting improper testimony on behalf of the appellee against the objection and exception of this appellant, and erroneously excluded proper testimony offered by this appellant upon the objection of the appellee and against the exception of this appellant.

Wherefore and for other reasons the defendant prays that the said judgment be reversed with costs.

JOHN WHALEN,
Defendant's Solicitor.

Indorsed:

United States Circuit Court For the Southern District of New York, In Equity. Samuel Pine and Frederick Muller, Complainants, against The Mayor, Aldermen and Commonalty of the City of New York, Defendants. Assignment of Errors. John Whalen, Defendant's Solicitor, No. 2 Tryon Row, New York. U. S. Circuit Court. Filed Oct. 31, 1900. John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK,

In the Second Circuit.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

Bond for damages and costs.

Know all men by these presents, That we, The United States Fidelity and Guaranty Company of Baltimore, Maryland, are held and firmly bound unto the above-named Samuel Pine and Frederick Muller, in the sum of one thousand dollars to be paid to the said Samuel Pine and Frederick Muller for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 30th day of October, in the year of our Lord one thousand nine hundred.

Whereas, The above-named The Mayor, Aldermen and Commonalty of the City of New York, defendants, have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above entitled suit, by the Judge of the Circuit Court of the United States, for the Southern District of New York, made and entered July 30, 1900.

Now, therefore, the condition of this obligation is such that if the above-named defendants shall prosecute said appeal to effect and answer all damages and costs, if said defendants fail to make the said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By SYLVESTER J. O'SULLIVAN,
Manager.

Attest:

WYLLYS BENEDICT,
Attorney in fact.

Sealed and delivered and taken and acknowledged this 30th day of October, 1900, before me.

HARRY C. HARDEN,
[SEAL.] Notary Public,
New York County.

Affidavit, acknowledgment and justification by the United States Fidelity and Guaranty Company.

WE WILL BOND YOU.

SOUTHERN DISTRICT OF NEW YORK,
State of New York,
County of New York, } ss.:

On this 30th day of October, one thousand nine hundred, before me personally came Sylvester J. O'Sullivan, known to me to be the manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of the Mayor, Aldermen, etc., as surety thereon, and who being by me duly sworn, deposes and says: That he resides in the City of New York, State of New York; and that he

is the manager of said The United Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of the Mayor, Aldermen, etc., is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said company; and that he signed his name thereto by like order and authority as manager of said company; and that he is acquainted with Wyllys Benedict and knows him to be the attorney in fact of said company; and that the signature of said Wyllys Benedict subscribed to said bond is in the genuine handwriting of said Wyllys Benedict and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars ($1,000,000).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence, this 30th day of October, 1900.

HARRY C. HARDEN,
[SEAL.] Notary Public (24),
New York County.

Indorsed:

U. S. Circuit Court, S. D. N. Y. Samuel Pine *et al vs.* The Mayor, etc. Bond. Approved as to form and also as to sufficiency of sureties, with reservation, however, to the complainants of the right at any time to examine the proper officers of the surety company, under oath, touching its liabilities, assets, and financial

condition generally. E. Henry Lacombe, U. S. Circuit Judge. U. S. Circuit Court. Filed October 31, 1900. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER, Complainants, *against* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Defendants.	In Equity.

The above-named defendant The Mayor, Aldermen and Commonalty of the City of New York, conceiving itself aggrieved by the decree made and entered July 30, 1900, in the above entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and a citation granted, directed to the above-named complainants commanding them and each of them to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said decree was made may be duly

authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated October 31, 1900.

JOHN WHALEN,
Solicitor and of Counsel for Defendant.

The above appeal is hereby allowed.

Dated October 31, 1900.

E. H. LACOMBE,
U. S. Circuit Judge.

Indorsed:

United States Circuit Court for the Southern District of New York, in Equity. Samuel Pine and Frederick Muller, Complainants, against the Mayor, Aldermen and Commonalty of the City of New York, Defendants. Petition on Appeal. John Whalen, Solicitor for Defendant, No. 2 Tryon Row, New York. Due and personal service of a copy of within petition and allowance of appeal is hereby admitted. Dated Nov. 1, 1900. Marshall, Moran, Williams & McVickar, Attys. for Complainants. U. S. Circuit Court. Filed Nov. 1, 1900. John A. Shields, Clerk.

By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States, for the Southern District of New York, in the Second Circuit, to Samuel Pine and Frederick Muller, GREETING:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the district and circuit above named, on the 28th day of November, 1900, pursuant to a petition and assignment of errors filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York,

wherein the Mayor, Aldermen and Commonalty of the City of New York are defendants and appellants, and you are complainants and respondents to show cause, if any there be, why the judgment in said suit in equity mentioned should not be corrected and reversed, and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the district and circuit above named, this 31st day of October, in the year of our Lord one thousand nine hundred, and of the Independence of these United States the one hundred and twenty-fifth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

Indorsed:

United States Circuit Court of Appeals for the Second Circuit. Samuel Pine and Frederick Muller, Complainants *vs.* The Mayor, Aldermen and Commonalty of the City of New York, Defendants. Citation. Due and personal service of a copy of within citation is hereby admitted. Dated Nov. 1, 1900. Marshall, Moran, Williams & McVickar, Attys. for Complainants. United States Circuit Court. Nov. 1, 1900. John A. Shields, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss.:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing papers numbered from one to 224, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Samuel Pine and Frederick Muller, complainants-appellees, against the Mayor, Aldermen and Commonalty of the City of New York, Defendants-

Appellants, as the same remain of record and on file in my office.

In Testimony Whereof I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of November, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fifth.

[SEAL.]
(STAMP)

JOHN A. SHIELDS,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 138.—October Term, 1900.

Before Judges Wallace, Wheeler and Thomas.

Samuel Pine and Frederick Muller, Complainants—Appellees, *against* The Mayor, etc., of the City of New York, Defendants—Appellants.	Submitted March 14, 1901. Decided October 30, 1901.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Thomas, *J.*—The first question is, whether the State of New York, in the exercise of its power of eminent domain, can enable the defendant the City of New York to erect within the limits of that State a dam across an unnavigable river, having its source in ponds in the State of New York, and divert the water thereby accumulated to a great distance for general distribution and use in the City of New York, and, by thus materially diminishing the flowage, substantially injure riparian rights in the State of Connecticut pertaining to a stream to which the river in New York is the principal tributary.

The second question is, whether a statute of New York purporting to enable the City of New York to do the act above stated, and providing a remedy whereby the riparian owner in Connecticut may obtain compensation for the injury, furnishes a proper remedy, or should the present suit to enjoin the defendant as a wrongdoer be sustained.

Without reference to authorities, certain applicable legal rules may be accepted, viz.: (1) The defendant is not a riparian owner and is not exercising the usual rights of riparian owners; (2) even if the defendant had acquired all the riparian rights save those of the complainants the diversion is not thereby justified; (3) the State of New York cannot authorize the taking of property in Connecticut; (4) the diversion of the water is not an act which a court of equity could approve or regulate under a power to apportion or adjust the use of the water among riparian owners; (5) the usual powers of the State of New York respecting navigable rivers within its borders does not extend to unnavigable interstate streams; (6) the diversion is a tortious act initiated in New York and, as to the complainants, taking effect in Connecticut, for which the present suit should lie; (7) the diversion of water at one point is a taking of the property of riparian owners below the point of diversion and falls within the constitutional protection; (8) the right of the complainants to use the water as it is wont to flow is not an easement, but an incident to and inseparably connected with their land; (9) a court of equity, asked to enjoin the taking the property, where such taking is not authorized and is therefore tortious, will not make its decree for an injunction conditional upon the ascertainment of the value of the property taken and payment to the complainants, unless there be present facts which should equitably estop the complainants and limit them to such relief.

The foregoing propositions are based largely upon principles of the common law and supported uniformly in all jurisdictions where, as to this subject, the common law prevails, as it does in the States of New York and Connecticut, unless certain decisions in Massachusetts be exceptions. The contention is understood to be that the latter decisions are authority for two propositions: (1) That the complainants' property rights taken by defendant are easements dependent upon servitudes upon land in the State of New York,

which servitudes the State of New York may, under its own law, extinguish upon making constitutional compensation, and thereby enable the defendant to continue the diversion; (2) That the statutory provision for compensation is the only remedy to which the complainants may resort in the State of New York.

The affirmance of the second proposition depends upon the establishment of the first. If the State of New York may extinguish the so-called servitudes in that State, in the exercise of its power of eminent domain, and thereby separate the same from complainants' property in Connecticut, so as to satisfy the complainants' whole claim for compensation, it may, of course, limit those injured to any method otherwise constitutional for making compensation. But if the act of diversion is tortious, and is not relieved of such character by some power of the State to extinguish the alleged servitudes, and thereby satisfy the complainants' whole demand for compensation, then the statute of New York, as a compulsory statute, is not binding upon the owners of riparian rights in Connecticut, and this Court will not compel such owners to employ the statute for the purposes of redress. A State cannot enact a statute purporting to authorize property to be taken beyond its boundaries, and deny a remedy to a person wronged unless he resort to and thereby ratify the statute by securing his compensation pursuant to it. In such case the State seizes by wrong and without constitutional right under the color of statute, and insists that the offended person shall waive the tort, declare the tortious act a valid act by seeking his remedy under the very statute which as to him is void and ineffective. The wrongdoer thus by sheer might commits an actionable wrong, and shields itself from answering therefor unless pursuant to the statutory command by which the wrong was ordered done.

What are the decisions in Massachusetts? The Court is referred to Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., 394; Banigan *vs.* City of Worcester, 30

F. R., 392; Manville Co. *vs.* City of Worcester, 138 Mass., 89. In the Brickett case the plaintiff, whose citizenship is not stated, owned land situated partly in Massachusetts and partly in New Hampshire. He brought an action for tort based upon the claim that the defendant, acting under an enabling statute of Massachusetts, had diminished the flow of water through this land, and asked to recover his damages in such action. In other words, he sought to recover the value of the property taken in a court of the jurisdiction where the tortious act was initiated. The Legislature had provided a particular statutory remedy for ascertaining such injury and consequent damages, and relegated the plaintiff to procedure under such statute, and, in effect, held that, when the proprietor of property outside of the State sought pecuniary redress in the State, he must pursue the new remedy that the State had provided for the particular class of injuries within which his own injury fell. The plaintiff objected that this statute was unconstitutional, not because it could have no extra-territorial operation, but "because it does not make adequate provision for the recovery of damages caused by the defendant's acts under it." The Court held that the statute was not open to such objection. That was the sole question in issue, and in determining such issue it was stated that it was not important that the land of the plaintiff which was injured was without the limits of the State. The plaintiff sought damages for a tort in the jurisdiction of the tort feasor. He did not ask for relief against the continuance of the tortious act. His action for damages was an affirmation of the taking, and he was constrained to resort to the same remedy that was obligatory upon those who sought similar relief. There is no occasion for criticising this holding. It was a mere application of a familiar rule that a new remedy for ascertaining damages, found ample to meet the constitutional requirement, supersedes the usual common law action. In Banigan *vs.* City of Worcester,

supra, it appears that, pursuant to an enabling act of Massachusetts, the defendant had diverted from a stream in that State water which would have flowed in its natural course through plaintiff's land in Rhode Island. The injured owner came into the Supreme Court of Massachusetts and petitioned that his damages might be assessed under the statute from which the defendant derived such authority as he had to make the diversion, and thereafter removed the case to the United States Circuit Court for the District of Massachusetts. The defendant moved to remand the case to the court of the State, and also filed a demurrer to the petition. It was considered that the right of removal existed, and that the petitioner might avail himself of the statute. It is difficult to conceive of other suitable holding. But in his opinion Judge Carpenter says:

> "On the demurrer the defendant alleges that the "petitions show no cause for relief under the stat- "ute. The argument is, that since the lands of the "petitioners are in Rhode Island and their rights "in the water of Tatnuck brook are appurtenant "to those lands, the petitioners cannot claim a "remedy under this statute unless it be held to "have extra-territorial effect, which, of course "is inadmissible. I cannot agree with this "argument. It has been held by the Su- "preme Court of Massachusetts that the "owner of land in an adjoining State may have, "as appurtenant to such land, an interest in land "or water in Massachusetts, which may be pro- "tected by suit in the courts of that State. Man- "ville Co. *vs.* City of Worcester, 138 Mass., 89. I "am strongly inclined to the opinion that the "decision in that case is of binding force on this "Court in the case at bar; and, even if it not be "so, I am inclined to follow that case as being of "high authority, and well supported by the reason "ing of the opinion."

It will be observed that the learned Judge does not state that all of the plaintiff's property rights taken are in the State of Massachusetts, so that they may be taken *uninvitum* under the power of eminent domain possessed by that State, but that they have an interest in land or water in Massachusetts, which may be protected by suit in courts of that State. The particular redress sought in the Banigan case was full compensation, and the property owner elected to obtain such redress in a statutory proceeding which had been provided by the State. This is far from holding that such statute was compulsory, and that if the foreign owner chose to assert that his property in Rhode Island could not be taken under the statute, relief enjoining the continuance of the diversion would be denied.

This brings the inquiry to the facts and holding in Manville *vs.* City of Worcester, to which Judge Carpenter referred in the language quoted, quite unnecessarily, as it seems, for the purposes of his decision. The action was for tort in diverting the waters of a natural stream in Massachusetts, and preventing the same from coming to the plaintiff's mill in the State of Rhode Island. The plaintiff was the owner of a mill in Rhode Island upon the Blackstone river; the defendant had withdrawn, in Massachusetts, enough of the waters of Tatnuck brook, a tributary of that river, materially to affect the operation of the mill. In the opinion it is stated:

> "The main question argued before us is raised by "the refusal of a ruling requested by the defend- "ant that 'the diversion of the waters of a natural "stream in this State and preventing the same "from coming to the plaintiff's mill, situated in "Rhode Island, is not a tort for which the plain- "tiff can recover in the courts of this Com- "monwealth.' The defendant's counsel con- "tended, in the first place, that such rights as the "plaintiff claims cannot extend beyond the Rhode

"Island line, and went the length of maintain-
"ing that a servitude cannot be created in one State
"in favor of lands in another. We are unable to
"agree to this proposition upon either principle
"or authority. Every decision and dictum that
"we have found, bearing on the precise point, is
"the other way (citing cases). We think that the
"cases which recognize civil, and even criminal,
"liability for flowing land, in one State by means of
"a dam in another, are hardly less pertinent
"(citing cases). The defendant admits these cases
"to be law, and tries to distinguish them. But we
"cannot assent to the distinction between dis-
"charging and withdrawing water. The conse-
"quence in one case is positive, in the other nega-
"tive; but in each it is the consequence of an act
"done outside the jurisdiction where the harm
"occurs, and the consequence is as direct in the
"latter case as in the former. The right infringed
"in the former case is called absolute ownership,
"in the latter easement; but the laws of Rhode
"Island, which make a man owner of a tract of
"land there, have no more power to diminish free-
"dom of action in Massachusetts than any other
"of its laws. A concurrence of the laws of both
"States is as necessary in that case as in the one
"at bar, to create a liability which can be
"enforced in either State consistently with
"principle. Such a concurrence presents no
"technical difficulties, and, if the substantive
"end to be attained is a proper one, it will
"be recognized and acted on here, and we have
"no doubt that it would be in Rhode Island if the
"position of the parties were reversed."

Thus far it appears that the action was for tort; that the Court held that there was a cause of action for tort; that the tortious act was done in the State of Massachusetts; that the injury was done in Rhode Island, and that a concurrence of the laws of both States

was necessary to create a liability which could be enforced in either State, consistently with principle. This last statement accords with the usual holding, that a tortious act, doing injury in one jurisdiction, will not be enforced in another, unless there is a cause of action in both jurisdictions. To this point there is no statement that is not in harmony with general law. But the opinion continues:

> "Of course, the laws of Rhode Island cannot subject Massachusetts land to a servitude, and apart from any constitutional considerations, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitudes. So it might authorize any acts to be done within its limits, however injurious to lands or persons outside them. But it does not do either. It has no more objection to a citizen of Rhode Island owning an easement, as incident to his ownership of land in that State, than it has to his owning it in gross, or to his purchasing lands here in fee. Questions might be conceived as to the transfer of such easements, but they do not arise here (Slack *vs.* Walcott, *ubi supra*). So far as their creation is concerned the law of Massachusetts governs, whether the mode of creation be by deed or prescription, or whether the right be one which is regarded as naturally arising out of the relation between the two States; being created, the law of Rhode Island, by permission of that of Massachusetts, lays hold of them and attaches them in such way as it sees fit to land there, Massachusetts being secured against anything contrary to its views of policy by the common traditions of the two States and by the power over its own territory which it holds in reserve."

The portion of the opinion last quoted holds (1) that Rhode Island cannot subject to a servitude land in Massachusetts; (2) that Massachusetts might prohibit the

creation of such servitudes, and, so far as their creation is concerned, the law of Massachusetts governs; (3) that after their creation the law of Rhode Island, by the permission of that of Massachusetts, attaches easements as it sees fit to the land in Rhode Island; (4) that Massachusetts might authorize any acts to be done within its limits, however injurious to lands or persons outside of them.

Two of the holdings above enumerated may be considered: That the property right of the riparian owner involves an easement to which land in the State of Massachusetts is subject by way of servitude; that the State of Massachusetts might authorize any acts to be done within its limits, however injurious to lands or persons outside of them. Relating these holdings to the case at bar, it should be observed that the property right of the owners in Connecticut has not been regarded as involving an easement. It is true that rights respecting the use of a stream, whereby the land of other riparian owners is burdened, may be acquired by grant or prescription. Such is the right to diminish the flowage to lower proprietors from the quantity originally due them, the right to corrupt the quality of water, or to set it back upon the lands of other proprietors. The rights thus obtained are easements, but primarily riparian proprietors are entitled to the natural flow of water that they may use the same as incident to the land bordering on the stream and owned by them. The water-course begins *ex jure naturæ*, and having taken a course naturally, all riparian owners own a use thereof as it flows and should flow the land owned by them (Kent's Com., vol. 3, pp. 439, 442). "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*Currere solebat*), without diminution or alteration" (Kent's Com., vol. 9, p. 439). But easements are acquired by grant, express or implied, or prescription (Wolfe *vs.* Frost, 4 Sandf., chap. 72;

Washburn on Real Property, vol. 2, p. 315, [5th ed.]). The right of a riparian owner that a stream shall flow naturally in its channel is not acquired either by grant or prescription. Servitudes are artificial creations; nature imposed the servitudes upon the banks of a stream, that it should be subject to the flow of water. Mr. Washburn (vol. 2, p. 366 [5th ed.]) says:

> "Property in water, in connection with real es-
> "tate, can only be predicated of its use, which
> "serves by its enjoyment to give value to the cor-
> "poreal hereditament with which its use is applied.
> "Thus the riparian proprietor of land bordering
> "upon a running stream has a right to the benefit
> "to be derived from the flow of water thereof, as
> "a natural incident to his estate, and no one may
> "lawfully divert the same against his consent. Nor
> "can this right be considered as an easement, since
> "it belongs to the estate of the landowner through
> "which the water flows, as forming one of the ele-
> "ments of which this estate is composed."

A writer of recognized authority upon this subject states:

> "The right to the use of the water in its natural
> "flow is not a mere easement or appurtenance, but
> "is inseparably annexed to the soil itself. It does
> "not depend upon appropriation or presumed
> "grant from long acquiescence on the part of other
> "riparian proprietors above and below, but exists
> "*jure naturæ* as parcel of the land" (Gould on
> "Waters, p. 396).

Such is the general view of the nature of the rights of riparian owners (St. Louis Mining and Milling Co. *vs.* Montana Mining Co., 58 F. R., 129, 137; Schriver *vs.* Smith, 100 N. Y., 471). The case last cited amply discusses the subject and precludes the necessity of reference to similar holdings in numerous authorities. Therefore, without further examination, the conclusion may be stated that the complainants have

no easements related to property within the State of New York which that State may take in the exercise of its power of eminent domain. This leaves unconsidered the statement in Manville *vs.* City of Worcester, to the effect that the State of Massachusetts "might authorize any acts to be done within its limits, however injurious to lands or persons outside of them." Does this mean that the Legislature of the State of Massachusetts may authorize a tortious act to be done within the limits of that State, to take effect upon property without the State? The statement should not be isolated and given such construction. Rather it is to be inferred that it relates to and is based upon the view that the proprietor in Rhode Island owned an easement or privilege in land in Massachusetts, of which the latter State had jurisdiction. But it is considered that such estimate of the nature of the property rights of riparian owners is not that usually adopted. Whatever may have been said *arguendo* in the opinion in Manville Co. *vs.* City of Worcester, it is obvious that there is no holding in the courts of Massachusetts or other jurisdiction that the Legislature of one State may authorize one of its municipalities to take, in the exercise of its power of eminent domain, property situated without the State, be it property of a riparian owner in a foreign State, or otherwise. On the other hand, the decision of Judge Shipman in the case at bar follows his conclusion in Holyoke Water Power Co. *vs.* The Connecticut River Co., 52 Conn., 570; 22 Blatch., 131, which has not been modified by subsequent decisions, and finds direct support in Rutz *vs.* City of St. Louis, 7 F. R., 438; opinion of Attorney-General of Pennsylvania, 54 Am. Law Register, 385; the discussion of Judge Story, in Slack *vs.* Walcott, 3 Mason, 517; of Judge Woodruff, in The Matter of Townsend, 39 N. Y., 179, and the article upon "The Power of a State to Divert an Interstate River," 8 Harv. Law Review, 138. Judge Story succinctly states the nature and location of rights similar to those involved in the suit at bar in Slack *vs.* Walcott. The plain-

tiffs were citizens of and owners of a mill in the State of Massachusetts, on the east side of Pawtucket river, and the defendants were citizens of and owners of a mill in Rhode Island, on the west side of the same river, the river forming the boundary between the two States. The bill was brought in the Circuit Court of the United States for the District of Rhode Island, to establish the title of the plaintiffs to a prior use of the water for the purpose of supplying their mill, and alleged an obstruction of the accustomed course of the water through their mill by the defendants, by withdrawing it to the use of the defendants on the Rhode Island side of the river, and prayed for an injunction. One of the plaintiffs died, having devised his interest in the mill to one Walcott. Upon due probate of the will in the State of Massachusetts, the devisee and the other plaintiffs brought a bill to revive the suit without making the heirs-at-law of the testator parties, and in considering whether the devisee was entitled to revive the suit, Judge STORY stated as follows:

"I am not prepared, however, to accede to the "argument of the defendant's counsel, that the "will in this case is not admissible in evidence "until after probate in the State of Rhode Island. "It does not strike me that any such probate for "the purposes of this suit is necessary. The mill "in controversy is situated in Massachusetts; the "river, the use of whose waters is claimed as "appurtenant to the mill, is the boundary "of the two States, and the waters, therefore, "partly flow in each State. The right, however, "is not a distinct right to the water, as *terra aqua* "*co-operata*, or as a distinct corporeal hereditament, but as an incident to the mill, and attached "to the realty. It passes by grant of the mill and "has no independent existence. It is not real "estate situated in Rhode Island. It is an incorporeal hereditament annexed to a freehold in "Massachusetts. And a conveyance of the mill,

"good by the laws of the State where the mill is "situated, conveys all the appurtenances. The "wrong done by stopping the flow of the water by "any obstruction or drain in Rhode Island is an "injury done to the mill itself in Massachusetts. "In a just sense the wrong may be said to be done "in both States, like the analogous case of an "injury to land lying in one county by an act done "in another county."

The judgment should be affirmed with costs.

WALLACE, *J.*, concurred.

WHEELER, *J.* (dissenting)—The defendant has done nothing in question here outside of the State of New York; the deprivation of water complained was wholly within that State, and if the plaintiffs have any rights in the water taken they exist within that State and were subject to and taken under the eminent domain of that State. The plaintiffs have come into this court because they are citizens of another State and *not because their lands through which they derive their rights to the water taken is situated in another State.* Mr. Justice Gray, in Head *vs.* Amoskeag Co., 113 U. S., 9, said, at page 9: "The right to the use of running water is *publici juris* and common to all the proprietors of the bed and banks of the stream from its source to its outlet." Thus these parties have a common interest in the water in question which the defendant has taken under the law of the State and not as a trespasser. It seems to be familiar law that when an injunction is applied for to restrain such a taking the damages will be ascertained and the injunction withheld on making payment. In that case Mr. Justice Gray further said, at page 21: "When property in which several persons have a common interest cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures neces-

sary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified."

The plaintiffs' rights do not depend at all upon State lines, and are not any different from what they would be if their lands were within the State of New York, and the damages can as well be ascertained as if the jurisdiction of that State extended over them. In Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., 394, Mr. Chief Justice Morton, in speaking of the eminent domain of Massachusetts over water flowing into New Hampshire, said: "We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State." As the plaintiffs have come into this court within the State where the taking complained of, which is not a trespass, was done for relief, they are entitled to and should have such relief as is usually afforded in such cases. I think the damages should be ascertained and the injunction withheld for an opportunity to pay them.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court-rooms in the Post Office Building, in the City of New York, on the 11th day of November, one thousand nine hundred and one.

Present—Hon. WILLIAM J. WALLACE, Circuit Judge, and Hon. HOYT H. WHEELER and Hon. EDWARD B. THOMAS, District Judges.

SAMUEL PINE *et al.*,
Complainants-Appellees,

against

THE MAYOR, *etc.*, OF THE CITY OF NEW YORK,
Defendants-Appellants.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration, wherefore, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said Circuit Court in accordance with this decree.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 286, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Samuel Pine *et al.*, against the Mayor, etc., of the City of New York, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3d day of December, in the year of our Lord one thousand nine hundred and one and of the Independence of the said United States the one hundred and twenty-sixth.

WILLIAM PARKIN,
Clerk.

238 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which The Mayor, Aldermen and Commonalty of the City of New York are appellants and Samuel Pine and Frederick Muller are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,

239 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of January, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

240 [Endorsed:] File No. 18,344. Supreme Court of the United States. No. 491, October term, 1901. The City of New York & Bird S. Coler, comptroller, *vs.* Samuel Pine and Frederick Muller. Writ of certiorari.

241 United States Circuit Court of Appeals, Second Circuit.

SAMUEL PINE ET AL., Complainants, Appellees,
vs.
THE MAYOR, ETC., OF THE CITY OF NEW YORK, Defendants, Appellants.

It is hereby stipulated that the record already certified and on file in the office of the clerk of the Supreme Court of the United States in the above-entitled case may be taken as the return to the writ of certiorari issued by said United States Supreme Court herein.

GEORGE L. STERLING,
Counsel for Appellants.
CHARLES C. MARSHALL,
STEPHEN E. WILLIAMS,
Counsel for Appellees.

Endorsed: United States circuit court of appeals, second circuit. Samuel Pine *vs.* The Mayor etc., of N. Y. Stipulation. United States circuit court of appeals, second circuit. Filed Jan. 10, 1902. William Parkin, clerk.

242 United States Circuit Court of Appeals, Second Circui

To the honorable the Supreme Court of the United States, Gr

The record and all proceedings whereof mention is withi having been lately certified and filed in the office of the clerk United States Supreme Court, a copy of the stipulation of co hereto annexed, and under direction of counsel for appella stipulation is hereby certified as a return to the writ of ce herein.

Dated New York, January 10th, 1902.

[Seal United States Circuit Court, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Ci

243 [Endorsed:] United States circuit court of appeals, circuit. Samuel Pine *v.* The Mayor, etc., of New Return to certiorari.

244 [Endorsed:] File No. 18,344. Supreme Court U. S. ber term, 1901. Term No. 491. The City of New *et al.*, petitioners, *vs.* Samuel Pine *et al.* Writ of certiorari turn. Filed Jan'y 13th, 1902.

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